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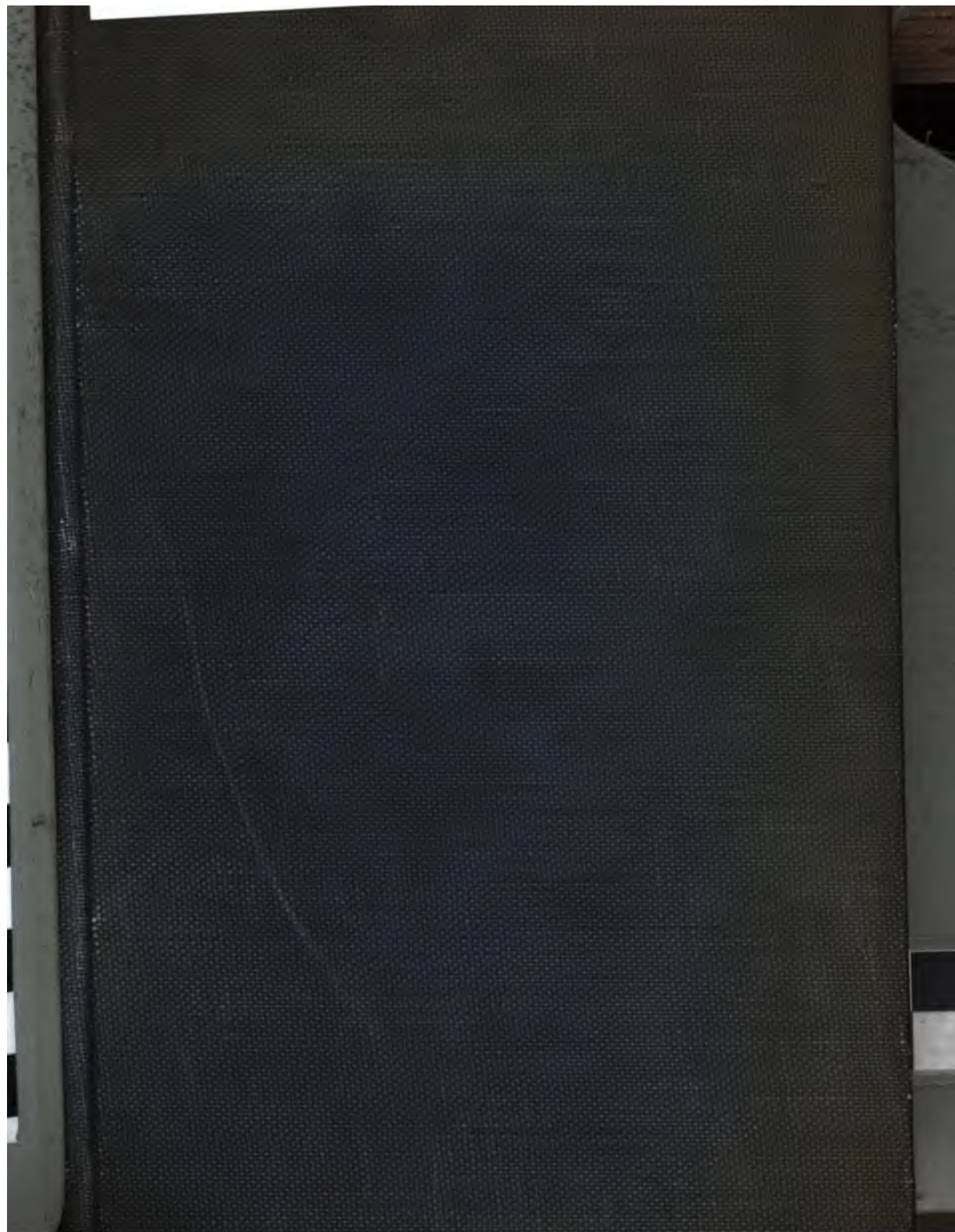
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SELECT
AMERICAN SPEECHES,

FORENSIC AND PARLIAMENTARY,

WITH

PREFATORY REMARKS:

BEING

A SEQUEL TO DR. CHAPMAN'S 'SELECT SPEECHES.'

~~~~~  
**BY S. C. CARPENTER, ESQ.**  
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VOL. II.



PHILADELPHIA:
PUBLISHED BY J. W. CAMPBELL AND E. WEEMS.
William Fry, Printer.
1815.

5821 '08

CONTENTS

OF THE SECOND VOLUME.

	Page
MR. Madison's Speech in the House of Representatives	
of the United States, on the British Treaty, - - -	1
Fisher Ames's Speech, on the same subject, - - -	23
Gouverneur Morris's Speech in the Senate of the United	
States, on the Judiciary Establishment, - - -	62
Mr. Rutledge's Speech in the House of Representatives of	
the United States, on the same subject, - - -	89
Mr. Bayard's Speech on the same subject, - - -	133
Mr. Randolph's Speech on the same subject, - - -	209
Mr. Wickham's Speech on the Trial of Aaron Burr for High	
Treason, - - - - -	233
Mr. Wirt's Speech in reply to the foregoing, - - -	279
Mr. Hughes's Speech on General Wilkinson's Proceedings	
at New Orleans, - - - - -	358
Dr. Watkins's Speech on the same subject, - - -	379
Mr. Ross's Speech in the Senate of the United States, on his	
Resolutions relative to the free Navigation of the Missis-	
sippi, - - - - -	403
Mr. Hanson's Speech in the House of Representatives of the	
United States, on the Loan Bill, - - - - -	428

MR. MADISON'S SPEECH,

**IN A COMMITTEE OF THE WHOLE HOUSE, ON THE BRITISH
TREATY, 15th APRIL, 1794.**

The Question—Resolved, as the opinion of this Committee, that it is expedient to pass the laws necessary for carrying into effect the Treaty with Great Britain.

EVERY man who pretends to be tolerably conversant with the history of America, is sufficiently acquainted with the origin and consequences of Mr. Jay's mission to St. James's, with the nature of the treaty he effected with the British cabinet, the exasperation excited by it in the opposition party, and the firmness displayed by Washington in ratifying it.

“The predetermined hostility which this treaty was doomed to encounter (says the illustrious biographer of Washington) increased its activity as the period for deciding the fate of that instrument approached. On its particular merits, no opinion could be formed, because they were unknown; but on the general question of reconciliation between the two countries, a decisive judgment was extensively made up. The sentiments called forth by the occasion, demonstrated that no possible adjustment of differences with Great Britain, no possible arrangement which might promise a future friendly intercourse with that power, could be satisfactory. The executive (Washington) was openly attacked, its system condemned, and the mission of Mr. Jay particularly was reprobated in terms of peculiar harshness.”

The treaty, however, was ratified by the senate; but when the lower house was resorted to for the laws necessary to carry it into effect, the antifederalists opposed it. At their head was our present president, Mr. Madison, who made the following speech upon the occasion.

MR. CHAIRMAN,

THE subject now under the consideration of the committee is of such vast extent, of such vital importance to this country, and involves so many topics which demand minute investigation, that I wish at setting out to be understood as not pretending to go through all the observations that may be applicable to its circumstances, but as endeavouring to present it in a mere general view, persuaded that the omissions I shall make, will be amply supplied by other gentlemen who are to follow me in the discussion.

The proposition, sir, immediately before the committee amounts to this, that the treaty lately made with Great Britain ought to be directly carried into effect by all such means and provisions, as are peculiarly within the province and the competency of the house of representatives to supply. This, sir, is the substance of the point immediately in question: But it will in examining it, be proper to keep constantly in view another proposition which was made yesterday, by the gentleman from Pennsylvania,* and referred to the committee, and which will be taken up of course, if the immediate question shall be decided in the negative.

Sir,—If the proposition for carrying the treaty into effect be agreed to by the house, it must necessarily be upon some one or other of the three following considerations;—That the legislature is bound by a constitutional

* MR. MACLAY, who moved a resolution "*that it is not expedient at this time to concur in passing the laws necessary for carrying the said treaty into effect.*"

necessity to pass the requisite laws, without examining the treaty or considering its merits—or, that on due examination the treaty is deemed to be in itself a good one—or that, apart from these considerations, there shall appear extraneous reasons of sufficient weight to induce the house to carry the treaty into effect, even though it should be thought to be in itself a bad treaty. The first of these considerations however, is now completely excluded by the late decision of the house, that they have a right to judge of the expediency or in expediency of passing laws relative to treaties—the question then first to be examined by the committee is that which relates to the merits of the present treaty. I will now therefore proceed to discuss those merits, and to present them to the committee under three different aspects. The first, as it relates to the execution of the treaty of peace, made in the year 1783.—The second, as it bears upon and determines the several points in the law of nations connected with it.—And the third, as it infringes upon, and may be supposed to affect the commercial intercourse of the two nations.

Sir, in animadverting upon the first of those, I will not take upon me the invidious office of enquiring which party it is to whom the censure may justly be ascribed of having more than the other contributed to the delay of its execution, though I am far from entertaining any desire to shrink from the task, under an apprehension that the result might be disadvantageous to this country. The present treaty has itself in express terms waved this enquiry, and professes that its purpose is to adjust all controversies on the subjects of which it is conversant, without regard to the mutual complaints or pretensions of the parties. Naturally therefore and most just it was to be expected, that the arrangements for carrying that treaty into effect would have been founded on the most exact, scrupulous and equitable reciprocity.—But, has this been

the case, sir? I venture to say that it has not—and it grieves me to add, what nevertheless truth and justice compel me to declare, that, on the contrary, the arrangements were founded on the grossest violation of that principle. This, sir, is undoubtedly strong language, and as such I should be one of the last men living to give it utterance, if I were not supported in it by facts no less strong and unequivocal. There are two articles in the old treaty for the execution of which no provision whatsoever is made in the new one.—The first is that which relates to the restitution of, or compensation for the negroes and other property carried away by the British. The second that which provided for the surrender to the United States of the posts so long withheld by them on our territory. The article that remained unexecuted on the part of the United States was that which stipulated for the payment of all *bona fide* debts owing to British creditors; and the present treaty guarantees the carrying of that article into the most complete effect by the United States, together with all damages sustained by the delay, even to the most rigid extent of exaction, while it contains no stipulation whatever on the part of Great Britain for the faithful performance of the articles left unexecuted by her. Look to the treaty, sir, and you will find nothing like it, nothing allusive to it.—No, on the contrary, she is entirely and formally absolved from her obligation to fulfil that article which relates to the negroes, and is discharged from making any compensation whatsoever for her having delayed to fulfil that which provided for the surrender of the posts.

I am aware, sir, of its being urged in apology, or by way of extenuation, for those very unequal stipulations, that the injury that could possibly be sustained by us in consequence of the detention of the posts by the British government, was not susceptible of an accurate valuation;

that between such an injury and money there was no common measure, and that therefore the wrong was incapable of liquidation, and afforded no fair basis for a calculation of pecuniary damages. This apology, sir, may appear plausible, but it is by no means satisfactory.—Nothing could be more obviously practicable than an adjustment of some kind in way of retribution—commissioners might easily have been appointed, as they were, vested too with full discretion, for other purposes, to take charge of this subject, with instructions to do what they could, if unable to do what they ought, and if incapable of effecting positive justice, at least of mitigating the severe and provoking injustice of not so much as attempting to do any thing. For the very extraordinary abandonment of the compensation due for the negroes and other property carried off by the British, apologies had also been lamely attempted; and these apologies demanded consideration. It is said to be at least doubtful whether this claim was ever authorised by the seventh article of the treaty of peace, and that Great Britain had uniformly denied the meaning put by the United States on that article. In reply to these assertions, it is sufficient for me to remark, that so far from its being true that Great Britain had uniformly denied the American construction of that article, it is susceptible of positive proof that till very lately Great Britain did uniformly admit our construction of it, and had rejected that claim on no other ground than the alleged violation of the fourth article on the part of the United States. But on the supposition that it had been true, that Great Britain had uniformly asserted a different construction of the article, and refused to accede to ours, I beg leave to ask the house what ought to have been done?—Ought we to have acceded at once to her construction?—You will anticipate me, sir, in saying, assuredly not. Each party had an equal right

to interpret the compact; and if they could not agree, they ought to have done in this, what they did in other cases, where they could not agree—that is, have referred the settlement of the meaning of the compact to arbitration: But, for us to give up the claim altogether because the other party to the compact thought proper to disallow our construction of it, was in effect to admit nothing less than that Great Britain had a better right than the United States to explain the point in controversy, or that the United States had done something which in justice called for a sacrifice of one of their essential rights.

From this view of the subject, sir, I consider it to be evident that the arrangements in this treaty which relate to the treaty of peace of 1783, are in several instances deficient both in justice and reciprocity. And here a circumstance occurs that in my opinion deserves the very particular attention of the committee. From the face of the treaty generally, and particularly from the order of the articles, it would seem that the compensation for the spoliation on our trade have been combined with the execution of the treaty of peace, and may therefore have been viewed as a substitute for the equivalent stipulated for the negroes. If this be really the meaning of the instrument, it cannot be the less obnoxious to reasonable and fair judges. No man can be more firmly convinced than I myself am, of the perfect justice on which the claims of the merchants on Great Britain are founded, nor can any one be more desirous to see them fully indemnified. But surely, sir, it will not be asserted that compensation to them is a just substitute for the compensation due to others. It is impossible that any claims can be better founded than those of the sufferers under the seventh article of the treaty of peace—because they are supported by positive and acknowledged stipulation as well as by equity and right. Just and undeniable as the

claims of the merchants may be, and certainly are, the United States cannot be obliged to take more care of them than of the claims equally just and unquestionable of other citizens; much less to sacrifice the latter to the former. To set this matter in a light that will exhibit it in the clearest and most familiar way possible to the understanding and the bosom of every member in this house, I will invert the case. Let us suppose for a moment that instead of relinquishing the claims for property wrongfully carried off at the close of the war, and obtaining stipulations in favour of the mercantile claims, the mercantile claims had been relinquished, and the other claims provided for—I ask, would not the complaints of the merchants have been as universal and as loud as they would have been just.

Sir, besides the omissions in favour of Great Britain which I have already pointed out, as particularly connected with the execution of the treaty of peace, the committee will perceive that there are conditions annexed to the partial execution of it in the surrender of the western posts, which increase the general inequality of this part of the treaty, and essentially affect the value of those objects. I beseech the committee to examine the point with the attention a subject of so very important a character demands.

The value of the posts to the United States is to be estimated by the influence of those posts. First on the trade with the Indians, and secondly on the temper and conduct of the Indians to the United States.

Their influence on the Indian trade depends principally on the exclusive command they give to the several carrying places connected with the posts. These places are understood to be of such importance in this respect, that those who possess them exclusively will have a monopoly of that lucrative intercourse with a great part of the

savage nations. Great Britain having exclusively possessed those places, has possessed all those advantages without a rival; and it was reasonably enough expected, that with the exclusive possession of the posts, the exclusive benefits of that trade and intercourse would be transferred also: but by the treaty now under consideration, the carrying places are to be enjoyed in common, and it will be determined by the respective advantages under which British and American traders will engage in the trade, which of them is to have the larger share in it. In this point of view, even if in no other, I view this regulation in the treaty as highly impolitic and injurious to the interests of this country.—I need not dwell upon the signal advantages the British will have in their superior capital, which we shall have to encounter in all our commercial rivalships: but there is another consideration which ought to have, and no doubt will have great weight with the committee on this subject. The goods imported for the Indian trade through Canada, pay no duties—whilst those imported through the United States for that trade, will have paid duties from seven to ten per cent. At the same time every man must see that a drawback is impracticable, or would be attended with an expense which the business would not bear. Whatever the value or the importance therefore which the posts may be supposed to derive from those considerations, they are in a great measure stripped of them by the condition annexed by this treaty to the surrender of the posts. Instead of securing, as it ought to have done, a monopoly in our favour, the carrying places are made common to both countries under circumstances which will in all probability throw a monopoly into the hands of Great Britain. Nor is this a transient or a temporary evil, for that article of the treaty is to last for ever. As to the influence of the posts on the conduct of the Indians, it is well known to depend chiefly

upon their influence on the Indian trade. In proportion therefore as the condition annexed to the surrender of posts affects the one it must affect the other. So long and in such degree as the British continue to enjoy the Indian trade, they will continue to influence the Indian conduct; and though that should not be in the same degree as heretofore, it will be at least in a degree sufficiently great to pass sentence of condemnation on the article in question.

Another very extraordinary feature in this part of the treaty, sir, is the permission that it grants to aliens to hold lands in perpetuity. I will not inquire how far this may be authorised by constitutional principles, but I will always maintain that there cannot be found in any treaty that ever was made, either where territory was ceded, or where it was acknowledged by one nation to another, one other such stipulation. Although I admit that in such cases it has been common, and may be right, to make regulations for the conservation of the property of the inhabitants, yet I believe it would appear, that, in every case of the kind that has occurred, the owners of landed property, when they were so favoured, were either called upon to swear allegiance to the new sovereign, or compelled to dispose of their landed property within a reasonable time.

Sir, the stipulation by which all the ports of the United States are to open to Great Britain, as a valuable consideration for, or condition upon which those of one of her unimportant provinces are to be opened to us in return, is marked with such signal inequality, that it ought not only to be rejected, but marked with censure. Nor is the clause respecting the Mississippi less censurable. To me, indeed, it appears singularly reprehensible. Happy is it for the United States, that the adjustment of our claims with Spain have been brought about before any evil

operation of the clause has been experienced. But of the tendency of the thing, I am persuaded, there can be no doubt. It is the more remarkable that this extension of the privileges of Great Britain on the Mississippi, beyond those contained in the treaty of peace, should have been admitted into the new treaty, because, by the latter itself, the supposition is suggested that Great Britain may be deprived, by her real boundary, of all pretensions to a share in the waters and on the banks of the Mississippi.

And now, sir, to turn to the second aspect in which I have undertaken to examine the question; namely, as it determines the several points in the law of nations connected with it. And here, I must say, that the same want of real reciprocity, and the same sacrifice of the interests of the United States, are conspicuous. Sir, it is well known that the principle that "**FREE SHIPS MAKE FREE GOODS,**" has ever been a great and favourite object with the United States; they have established this principle in all their treaties; they have witnessed with anxiety the general effort and the successful advances towards incorporating this principle in the law of nations; a principle friendly to all neutral nations, and particularly interesting to the United States. I know, sir, that it has before now been conceded, on the part of the United States, that the law of nations stood as the present treaty regulates it; but it does not follow that more than acquiescence in that doctrine, is proper. There is an evident and a material distinction between silently acquiescing in it, and giving it the additional force and support of a formal and positive stipulation. The former was all that could have been required, and the latter was more than ought to have been unnecessarily yielded. The treaty is liable to similar objections in respect of the enumeration it contains of contraband articles, in which, sir, I am sorry to be obliged to remark, that the circumstances and interests of

United States have been made to give way to the particular views of the other party, while the examples held out in our other treaties have been disregarded. Hemp, tar, pitch, turpentine, &c. important staples of this country, have, without even a pretext of reciprocity, been subjected to confiscation. No nation which produces these articles has, I believe, any treaties at present, making the same sacrifice, with the exception of Denmark, who, in the year 1780, by what means I know not, was induced to agree to an explanation of the treaty of 1670, by which these articles are declared to be contraband. Now, sir, it appears to me that this same supplementary and explanatory agreement between Great Britain and Denmark, has been the model selected for the contraband list of the treaty at present in question; the enumeration in the latter being transcribed, word for word, from the former, with a single exception, which, not only is in itself, but renders the whole transaction extremely remarkable. The article "HORSES," which stands as one part of the original, is entirely omitted in the copy; and what renders the omission more worthy of scrutiny, is, that though the treaty in general seems to have availed itself, wherever it readily could, of the authority of Vattel, the omission of horses has been no less a departure from him, than from the original from which that part of the treaty was copied. Indeed, the whole of this particular transaction seems fraught with singularity and just liability to suspicion; for, strange as it may appear, it is certainly true, that the copy had proceeded exactly from the original, till it got as far as the purposes of Great Britain required, and at that point stopt short. I intreat the committee to pay attention to this fact. After enumerating the articles that are to be deemed contraband, the Danish article goes on in the words following, viz. "But it is expressly declared, that among contraband merchan-

dizes, shall not be comprehended, fish and meats, whether fresh or salted; wheat, flour, corn, or other grain; beans, oil, wines, and generally whatever serves for the nourishment and support of life; all of which may at all times be sold and transported like any other merchandizes, even to places held by an enemy of the two crowns, provided they be not besieged or blockaded."

This view of the subject naturally leads me to make some observations on that clause of the treaty which relates to provisions, and which, to say the least of it, wears a very ambiguous and disagreeable countenance; or, to speak more precisely, seems to carry with it a necessary implication that provisions, though not bound to besieged or blockaded places, may, according to the law of nations, as it now exists, be regarded and treated as contraband. According to the genuine law of nations, no articles which are not expressly and generally contraband, are so, in any particular instance, except in the single case of their going to a place besieged; yet it is recognized by this treaty, that there *are* other cases in which provisions may be deemed contraband, from which recognition implication fairly results, that one of those cases may be that which has been assumed and put in force by Great Britain, in relation to the United States. Such trivial cases as might be devised by way of appurtenances to the law that condemns what is bound to blockaded places, can by no means satisfy the import of the stipulation, because such cases cannot be presumed to have been in contemplation of the parties. And if the particular case of provisions bound to a country at war, although not to a besieged place, was not meant to be one of the cases of contraband according to the existing law of nations, how necessary was it to have said so; and how easy and natural would that course have been, with the Danish example on the subject before their eyes.

On the supposition that provisions in our own vessels bound to countries at war with Great Britain can be now seized by her for her own use on the condition stipulated, this feature of the treaty, sir, presents itself in a very serious light indeed, especially if the doctrine be resorted to that has been laid down by the executive in the letter of Mr. Jefferson, then secretary of state, to Mr. Pinckney, on the 7th of September, 1793. This letter is a comment on the British instructions of June the 8th, 1793, for seizing neutral provisions. After stating the measure as a flagrant breach of the law of nations, and as ruinous to our commerce and agriculture, it has the following paragraph: "This act too tends to draw us from that state of peace in which we are willing to remain. It is an essential character of neutrality to furnish no aids not stipulated by treaty," That is, sir, by a treaty made prior to the war—"to one party which we are not equally ready to furnish to the other. If we permit corn to be sent to Great Britain and her friends, we are equally bound to permit it to be sent to France. To restrain it would be a partiality that must lead to war; and between restraining it ourselves, and permitting her enemies to restrain it unrightfully, there is no difference. She would consider it as a mere pretext, of which she certainly would not agree to be the dupe; and on what honourable ground could we otherwise explain it? Thus we should see ourselves plunged, by this unauthorized act of Great Britain into a war with which we meddle not, and which we wish to avoid, if justice to all parties, and from all parties, will enable us to avoid it." Sir, I entreat the committee to give this very interesting executive document all the attention which it demands, and they have it in their power to bestow.

I am now, sir, come to that article of the treaty by which the sequestration of British property is prohibited; upon which I must say, that though I should in all probability be one of the last men existing to have recourse to such an expedient for redress, I cannot approve of a perpetual and irrevocable abandonment of a defensive weapon, the existence of which may render the use of it unnecessary. Sir, there is an extraordinary peculiarity in the situation of this country as it stands in its relations to Great Britain. As we have no fleets or armies to command a respect for our rights, we ought to keep in our own hands all such means as our situation gives us. This article, sir, is another instance of the very little regard that has been paid to reciprocity. It is well known that British subjects now have, and are likely always to have in this country a vast quantity of property of the kind made sacred. American citizens, it was known, had little, and were likely to have little of the kind in Great Britain. If a real reciprocity had been intended, why were not other kinds of private property, such as vessels and their cargoes, equally protected against violation? These, even within the jurisdiction of Great Britain, are left open to seizure and sequestration, if Great Britain shall find it expedient; and why was not property on the high seas under the protection of the law of nations, which is said to be a part of the law of the land, made secure by a like stipulation? This would have given a face of equality and reciprocity to the bargain. But nothing of the sort makes a part of it. Where Great Britain has a particular interest at stake, the treaty watchfully provides for it; when the United States have an equal interest at stake, and equally intitled to protection, it is abandoned to all the dangers which it has experienced.

Having taken this brief review of the positive evils in this part of the treaty, I might add the various omissions

which are chargeable upon it: But, as I shall not pretend to exhaust the subject, I will mention only one, and that is the utterly neglecting to provide for the exhibition of sea papers; and, I cannot help regarding this omission as truly extraordinary, when I observe that in almost every modern treaty, and particularly in all *our* other treaties, an article on this subject has been regularly inserted. Indeed it has become almost an article of course in the treaties of the present century.

I am now, sir, come to the third aspect in which the commercial articles of this treaty present themselves for consideration. In the free intercourse stipulated between the United States and Great Britain, it cannot be pretended that any advantage is gained by the former. A treaty is surely not necessary to induce Great Britain to receive our raw materials and to sell us her manufactures. Let us, on the other hand, consider what is given up by the United States.

It is well known that when our government came into operation, the tonnage of America employed in the British trade, bore a very inconsiderable proportion to the British tonnage. There being nothing on our side to counteract the influence of capital and other circumstances on the British side, that disproportion was the natural state of things. As some small balance to the British advantages, and particularly that of her capital, our laws had made several regulations in favour of our shipping, among which was the important encouragement resulting from the difference of ten per cent in the duties paid by American and foreign vessels. Under this encouragement the Americantonnage has increased in a very respectable degree of proportion to the British tonnage. Great Britain has never deemed it prudent to frustrate or diminish the effects of this by attempting any countervailing measures for her shipping; being aware, no doubt, that we could

easily preserve the difference by further measures on our side: But by this treaty she has reserved to herself the right to take such countervailing measures against our existing regulations, and we have surrendered our right to pursue further defensive measures against the influence of her capital. It is justly to be apprehended, therefore, that under such a restoration of things to their former state, the American tonnage will relapse into its former disproportion to the British tonnage.

Sir, when I turn my attention to that branch of the subject which relates to the West Indies, I see still greater cause for astonishment and dissatisfaction. As the treaty now stands, Great Britain is left as free as she ever has been to continue to herself and her shipping, the entire monopoly of the intercourse. Recollecting, as I do, and as every member of the committee must do, the whole history of this subject, from the peace of 1783, through every subsequent stage of our independence, down to mission of the late envoy, I find it impossible adequately to express my astonishment that any treaty of commerce should ever have been acceded to, that so entirely abandoned the very object for which alone such a treaty could have been contemplated; I never could have believed that the time was so near, when all the principles, claims, and calculations which have heretofore prevailed among all classes of people, in every part of the union, on this interesting point, were to be so completely renounced. A treaty of commerce with Great Britain, excluding a reciprocity for our vessels in the West India trade, is a phenomenon which fills me with more surprise than I know how to express.

I may be told, perhaps, that in the first place Great Britain grants to no other nation, the privilege granted to the United States of trading at all with her West Indies, and that, in the second place, this is an important relaxation

of the colonial system established among the nations of Europe. To the first of these observations, I reply, that no other nation bears the same relation to the West Indies as the United States; that the supplies of the United States are essential to those islands; and that the trade with them has been permitted purely on that account, and not as a beneficial privilege to the United States.

To the second, I reply, that it is not true that the colony system required an exclusion of foreign vessels, from the carrying trade between the colonies and foreign countries. On the contrary, the principle and practice of the colony system are, to prohibit as much as may be convenient, all trade between the colonies and foreign countries; but when such a trade is permitted at all, as necessary for the colonies, then to allow the vessels of such foreign countries a reciprocal right of being employed in the trade. Great Britain has accordingly restrained the trade of her islands with this country as far as her interest in them will permit. But, has she allowed our vessels the reciprocal right to carry on the trade so far as it is not restrained? No, no such thing. Here, she enforces a monopoly in her own favour, contrary to justice, and contrary to the colonial system of every European that possesses any colonies; none of whom, without a single exception, ever open a trade between their colonies and other countries, without opening it equally to vessels on both sides. This is evidently nothing more than strict justice. A colony is a part of an empire. If a nation choose, she may prohibit all trade between a colony and a foreign country, as she may between any other part of her dominions and a foreign country; but if she permit such a trade at all, it must be free to vessels on both sides, as well in the case of colonies as of any other part of her dominions. Great Britain has the same right to prohibit foreign trade between London and the United States, as between Jamaica and the United

States; but if no such prohibition be made with respect to either, she is equally bound to allow foreign vessels a common right with her own in both. If Great Britain were to say that no trade whatever shall be carried on between London and the United States, she would exercise a right of which we could not reasonably complain. If she were to say that no American vessels should be employed in the trade, it would produce just complaints and justify a reciprocal regulation as to her vessels. The case of the trade from a port in the West Indies is precisely similar.

In order that the omission of the treaty to provide a reciprocity for our vessels in the West India trade, may be placed in its true light, it will be proper to attend to another part of the treaty, which ties up the hands of this country against every effort for making it the interest of Great Britain to yield to our reasonable claims. To this end I beg leave to point out to the committee, the clause which restrains the United States from imposing prohibitions or duties on Great Britain, in any case, which shall not extend to all other nations, and to observe that the clause makes it impossible to operate on the unreasonable policy of that nation, without suspending our commerce at the same time with all other nations, whose regulations with respect to us may be ever so favourable and satisfactory.

The fifteenth article, Mr. Chairman, has another extraordinary feature, which I should imagine must strike every observer. In other treaties which profess to put the parties on the footing of the most favoured nation, it is stipulated that where new favours are granted to a particular nation in return for favours received, the party claiming the new favour shall pay the price of it. This is just and proper where the footing of the most favoured nation is established at all. But this article gives

to Great Britain the full benefit of all privileges that may be granted to any other nation, without requiring from her the same or equivalent privileges with those granted by such nation. Hence it would happen, that, if Spain, Portugal or France should open their colonial ports to the United States, in consideration of certain privileges in our trade, the same privileges would result gratis and ipso facto to Great Britain. This stipulation, sir, I consider as peculiarly impolitic, and such a one as can not fail to form, in the view of the committee, a very solid and weighty objection to the treaty.

I dare say, sir, that by the advocates of the treaty great stress will be laid on the article relating to the East Indies. To those who are better acquainted with the subject than I can pretend to be, I shall resign the task of examining and explaining that part of the subject. With two observations, however, I must trouble the committee before I drop the subject of this article; one is, that some gentlemen, as judicious and well informed as any who can be consulted, declare that they consider this article as affording not a shadow of advantage to the United States. The other is, that no privilege is stipulated in it, which has not heretofore been uniformly granted without stipulation; and as the grant can have proceeded from no motive but a pure regard to the British interest in that country, there was every reasonable security that the trade would continue open as it had been, under the same consideration.

Such, Mr. Chairman, being the character of this treaty, as it relates to the execution of the treaty of peace, the great principles of the law of nations, and the regulations of commerce, it never can be viewed as having any claim to be carried into effect on its own account. Is there then any consideration extraneous to the treaty that can furnish the requisite motives? On this part of the subject

the house is wholly without information. For myself, I am ready to declare that I have neither seen, nor known, nor heard, of any circumstances in the general posture of affairs, or in the particular relations of this country to them, that can account for the unequal and injurious arrangements which we are now called upon for laws to execute. But there is something further to be taken into account; I mean the continuance of the spoliations on our trade, and the impressment of our seamen, whether to be understood as practical comments on the treaty, or as infractions of it, cannot but enforce on the minds of the committee the most serious reflections. And here, sir, I beg leave to refer once more to the passage I have already read, extracted from the letter of Mr. Jefferson to Mr. Pinckney, and to ask if, as there stated by the executive, our neutrality and peace are to be exposed by permitting practices of that kind, what must be thought of our giving effect, in the midst of such practices, to a treaty from which a countenance might be derived by that nation for going on further with them.

I am aware that the executive, notwithstanding the doctrine and policy laid down as above, has finally concurred in the treaty under all those circumstances. But I do not consider that as invalidating the reasoning drawn from the present state of things. I may be treading on delicate ground; but I cannot think it improper to remark, because it is a known fact, that the executive paused for some weeks after the concurrence of the senate, before he ratified the treaty with his signature; and I think it may fairly be presumed that the true grounds of that pause were the renewal of spoliation, and a recollection of the lights in which they had been represented; that on that supposition he was probably influenced in signing the treaty when he did, by an expectation that such a mark of confidence in the British government, would produce an

abolition of the unlawful proceeding, and consequently, if it were foreseen that the spoliations would have been continued, as we find them to be, the treaty would not have been then signed, or if it had not been then signed, it would not be signed under the circumstances of the moment, when it is falling under our consideration.

I shall conclude, Mr. Chairman, with taking notice of two considerations which have been made great use of by way of inducing congress to carry the treaty into effect. In the first place it has been said, that the greater part of the treaty is to continue in force for no longer a time than two years after the termination of the present war in Europe; and that no very great evils can grow out of it in that short period. To this I reply, that ten of the articles containing very objectionable stipulations, are perpetual; and that, in the next place, it will be in the power of Great Britain, at the expiration of the other articles, to produce the same causes for the renewal of them, as are now urged in their support. If we are now to enforce the treaty lest Great Britain should stir up the Indians, and refuse to pay our merchants for the property of which she has plundered them, can she not, at the end of two or three years, plunder them again, to the same or greater amount; cannot the same apprehensions be revived with respect to the Indians, and will not the arguments then be as strong as they are now, for renewing the same treaty, or for making any other equal sacrifices that her purposes may dictate.

It has been asked, what would be the consequences of refusing to carry the treaty into effect? I answer, that the only supposable consequence is, that the executive, if governed by the prudence and patriotism, which I do not doubt will govern that department, will of course pursue the measures most likely to obtain a reconsideration and remodification of the offensive parts of the treaty. The idea of war as a consequence of refusing to give effect to

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the treaty, is too visionary and incredible to be admitted into the question. No man will say that the United States, if they be really an independent people, have not a right to judge of their own interests, and to decline any treaty that does not duly provide for them. A refusal, therefore, in such cases, can afford no cause, nor pretext, nor provocation for war, or for any just resentment. But, apart from this, is it conceivable that Great Britain, with all the dangers and embarrassments that are thickening on her, will wantonly make war on a country which is the best market she has in the world for her manufactures, which pays her an annual balance in specie, of ten or twelve millions of dollars, and whose supplies, moreover, are essential to an important part of her dominions? Such a degree of infatuation ought not to be ascribed to any country. And, at the present crisis, for reasons well known, an unprovoked war from Great Britain, on this country, would argue a degree of madness, greater than any other circumstances that could well be imagined.

With all the objections, therefore, to the treaty, which I have stated, I hope it will not now be carried into effect, and that an opportunity will take place for reconsidering the subject, on principles more just and favourable to the United States.

SPEECH OF MR. AMES,

ON THE SAME OCCASION, DELIVERED 15th APRIL, 1795.

MR. CHAIRMAN,

I ENTERTAIN the hope, perhaps a rash one, that my strength will hold me out to speak a few minutes.

In my judgment, a right decision will depend more on the temper and manner, with which we may prevail upon ourselves to contemplate the subject, than upon the development of any profound political principles, or any remarkable skill in the application of them. If we could succeed to neutralize our inclinations, we should find less difficulty than we have to apprehend in surmounting all our objections.

The suggestion, a few days ago, that the house manifested symptoms of heat and irritation, was made and retorted as if the charge ought to create surprise, and would convey reproach. Let us be more just to ourselves and to the occasion. Let us not affect to deny the existence and the intrusion of some portion of prejudice and feeling into the debate, when, from the very structure of our nature, we ought to anticipate the circumstance as a probability, and when we are admonished by the evidence of our senses that it is a fact. How can we make professions for ourselves, and offer exhortations to the house, that no influence should be felt but that of duty, and no guide respected but that of the understanding, while the peal to rally every passion of man is continually ringing in our ears. Our understandings have been addressed, it is true, and with ability and effect; but, I demand, has any corner of the heart been left unexplored? It has been ransacked to find auxiliary arguments; and, when that

attempt failed, to awaken the sensibility, that would require none. Every prejudice and feeling has been summoned to listen to some peculiar style of address; and yet we seem to believe, and to consider a doubt as an affront, that we are strangers to any influence but that of unbiassed reason.

It would be strange, that a subject, which has roused in turn all the passions of the country, should be discussed without the interference of any of our own. We are men, and therefore not exempt from those passions: as citizens and representatives, we feel the interest that must excite them. The hazard of great interests cannot fail to agitate strong passions: we are not disinterested; it is impossible we should be dispassionate. The warmth of such feelings may becloud the judgment, and, for a time, pervert the understanding. But the public sensibility, and our own, has sharpened the spirit of inquiry, and given an animation to the debate. The public attention has been quickened to mark the progress of the discussion, and its judgment, often hasty and erroneous on first impressions, has become, solid and enlightened at last. Our result will, I hope, on that account, be the safer and more mature, as well as more accordant with that of the nation. The only constant agents in political affairs are the passions of men. Shall we complain of our nature; shall we say that man ought to have been made otherwise. It is right already, because ~~we~~, from whom we derive our nature, ordained it so; and because, thus made and thus acting, the cause of truth and the public good is the more surely promoted.

But an attempt has been made to produce an influence of a nature more stubborn, and more unfriendly to truth. It is very unfairly pretended, that the constitutional right of this house is at stake, and to be asserted and preserved only by a vote in the negative. We hear it said, that this is a struggle for liberty, a manly resistance against the

design to nullify this assembly, and to make it a cypher in the government: that the president and senate, the numerous meetings in the cities, and the influence of the general alarm of the country, are the agents and instruments of a scheme of coercion and terror, to force the treaty down our throats, though we loath it, and in spite of the clearest convictions of duty and conscience.

It is necessary to pause here, and inquire, whether suggestions of this kind be not unfair in their very texture and fabric, and pernicious in all their influences. They oppose an obstacle in the path of inquiry, not simply discouraging, but absolutely insurmountable. They will not yield to argument; for, as they were not reasoned up, they cannot be reasoned down. They are higher than a Chinese wall in truth's way, and built of materials that are indestructible. While this remains, it is vain to say to this mountain, be thou cast into the sea. For I ask of the men of knowledge of the world, whether they would not hold him for a blockhead, that should hope to prevail in an argument, whose scope and object it is to mortify the self-love of the expected proselyte? I ask further, when such attempts have been made, have they not failed of success? The indignant heart repels a conviction, that is believed to debase it.

The self-love of an individual is not warmer in its-sense, nor more constant in its action, than what is called in French *l'esprit du corps*, or the self-love of an assembly; that jealous affection which a body of men is always found to bear towards its own prerogatives and power. I will not condemn this passion. Why should we urge an unmeaning censure, or yield to groundless fears that truth and duty will be abandoned, because men in a public assembly are still men, and feel that *esprit du corps* which is one of the laws of their nature? Still less should we despond or complain, if we reflect, that this very

spirit is a guardian instinct that watches over the life of this assembly. It cherishes the principle of self-preservation, and without its existence, and its existence with all the strength we see it possess, the privileges of the representatives of the people, and, mediately, the liberty of the people would not be guarded, as they are, with a vigilance that never sleeps, and an unrelaxing constancy and courage.

If the consequences most unfairly attributed to the vote in the affirmative were not chimerical, and worse, for they are deceptive, I should think it a reproach to be found even moderate in my zeal to assert the constitutional powers of this assembly; and whenever they shall be in real danger, the present occasion affords proof, that there will be no want of advocates and champions.

Indeed so prompt are these feelings, and, when once roused, so difficult to pacify, that, if we could prove the alarm was groundless, the prejudice against the appropriations may remain on the mind, and it may even pass for an act of prudence and duty to negative a measure, which was lately believed by ourselves, and may hereafter be misconceived by others, to encroach upon the powers of the house. Principles that bear a remote affinity with usurpation on those powers will be rejected, not merely as errors, but as wrongs. Our sensibility will shrink from a post, where it is possible it may be wounded, and be inflamed by the slightest suspicion of an assault.

While these prepossessions remain, all argument is useless: it may be heard with the ceremony of attention, and lavish its own resources, and the patience it wears to no manner of purpose. The ears may be open, but the mind will remain locked up, and every pass to the understanding guarded. Unless therefore this jealous and repulsive fear for the rights of the house can be allayed, I will not ask a hearing.

I cannot press this topic too far; I cannot address myself with too much emphasis to the magnanimity and candour of those who sit here, to suspect their own feelings, and while they do, to examine the grounds of their alarm. I repeat it, we must conquer our persuasion, that this body has an interest in one side of the question more than the other, before we attempt to surmount our objections. On most subjects, and solemn ones too, perhaps in the most solemn of all, we form our creed more from inclination than evidence.

Let me expostulate with gentlemen to admit, if it be only by way of supposition, and for a moment, that it is barely possible they have yielded too suddenly to their alarms for the powers of this house; that the addresses, which have been made with such variety of forms, and with so great dexterity in some of them, to all that is prejudice and passion in the heart, are either the effects or the instruments of artifice and deception, and then let them see the subject once more in its singleness and simplicity.

It will be impossible, on taking a fair review of the subject, to justify the passionate appeals that have been made to us to struggle for our liberties and rights, and the solemn exhortations to reject the proposition, said to be concealed in that on your table, to surrender them for ever. In spite of this mock solemnity, I demand, if the house will not concur in the measure to execute the treaty, what other course shall we take? How many ways of proceeding lie open before us?

In the nature of things, there are but three: we are either to make the treaty, to observe it, or break it. It would be absurd to say, we will do neither. If I may repeat a phrase already so much abused, we are under coercion to do one of them; and we have no power, by the exercise of our discretion, to prevent the consequences of a choice.

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I shall conclude, Mr. Chairman, with taking notice of two considerations which have been made great use of by way of inducing congress to carry the treaty into effect. In the first place it has been said, that the greater part of the treaty is to continue in force for no longer a time than two years after the termination of the present war in Europe; and that no very great evils can grow out of it in that short period. To this I reply, that ten of the articles containing very objectionable stipulations, are perpetual; and that, in the next place, it will be in the power of Great Britain, at the expiration of the other articles, to produce the same causes for the renewal of them, as are now urged in their support. If we are now to enforce the treaty, and Great Britain should stir up the Indians, and refuse to pay our merchants for the property of which we have been robbed, can she not, at the end of two or three years, produce her again, to the same or greater extent, and cause the apprehensions to be revived with respect to the Indians, and will not the arguments then be as strong as before, for renewing the same treaty, or for making some other equal articles that her purposes may be reached.

It has been asked, what would be the consequence of changing the treaty into effect? I answer, that the consequence would be, that the treaty would be in force, and that the purposes of the treaty would be reached. I have said, that the treaty would be in force, and that the purposes of the treaty would be reached. I have said, that the treaty would be in force, and that the purposes of the treaty would be reached.

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SPEECH OF MR. AMES,

ON THE SAME OCCASION, DELIVERED 15th APRIL, 1795.

MR. CHAIRMAN,

I ENTERTAIN the hope, perhaps a rash one, that my strength will hold me out to speak a few minutes.

In my judgment, a right decision will depend more on the temper and manner, with which we may prevail upon ourselves to contemplate the subject, than upon the development of any profound political principles, or any remarkable skill in the application of them. If we could succeed to neutralize our inclinations, we should find less difficulty than we have to apprehend in surmounting all our objections.

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attempt failed, to awaken the sensibility, that would require none. Every prejudice and feeling has been summoned to listen to some peculiar style of address; and yet we seem to believe, and to consider a doubt as an affront, that we are strangers to any influence but that of unbiassed reason.

It would be strange, that a subject, which has roused in turn all the passions of the country, should be discussed without the interference of any of our own. We are men, and therefore not exempt from those passions: as citizens and representatives, we feel the interest that must excite them. The hazard of great interests cannot fail to agitate strong passions: we are not disinterested; it is impossible we should be dispassionate. The warmth of such feelings may becloud the judgment, and, for a time, pervert the understanding. But the public sensibility, and our own, has sharpened the spirit of inquiry, and given an animation to the debate. The public attention has been quickened to mark the progress of the discussion, and its judgment, often hasty and erroneous on first impressions, has become, solid and enlightened at last. Our result will, I hope, on that account, be the safer and more mature, as well as more accordant with that of the nation. The only constant agents in political affairs are the passions of men. Shall we complain of our nature; shall we say that man ought to have been made otherwise. It is right already, because *HE*, from whom we derive our nature, ordained it so; and because, thus made and thus acting, the cause of truth and the public good is the more surely promoted.

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our commercial and agricultural concerns, that it would not be generally discovered by its effects to be in force, during the term for which it was contracted. I place considerable reliance on the weight men of candour will give to this remark, because I believe it to be true, and little short of undeniable. When the panic dread of the treaty shall cease, as it certainly must, it will be seen through another medium. Those who shall make search into the articles for the cause of their alarms, will be so far from finding stipulations that will operate fatally, that they will discover few of them that will have any lasting operation at all. Those which relate to the disputes between the two countries will spend their force upon the subjects in dispute, and extinguish them. The commercial articles are more of a nature to confirm the existing state of things, than to change it. The treaty alarm was purely an address to the imagination and prejudices of the citizens, and not on that account the less formidable. Objections that proceed upon error in fact or calculation, may be traced and exposed; but such as are drawn from the imagination, or addressed to it, elude definition, and return to domineer over the mind, after having been banished from it by truth.

I will not so far abuse the momentary strength that is lent to me by the zeal of the occasion, as to enlarge upon the commercial operation of the treaty. I proceed to the second proposition, which I have stated as indispensably requisite to a refusal of the performance of a treaty: will the state of public opinion justify the deed?

No government, not even a despotism, will break its faith, without some pretext; and it must be plausible, it must be such as will carry the public opinion along with it. Reasons of policy, if not of morality, dissuade even Turkey and Algiers from breaches of treaty in mere wantonness of perfidy, in open contempt of the reproaches

of their subjects. Surely a popular government will not proceed more arbitrarily, as it is more free; nor with less shame or scruple, in proportion as it has better morals. It will not proceed against the faith of treaties at all, unless the strong and decided sense of the nation shall pronounce, not simply that the treaty is not advantageous, but that it ought to be broken and annulled.

Such a plain manifestation of the sense of the citizens is indispensably requisite; first, because, if the popular apprehensions be not an infallible criterion of the disadvantages of the instrument, their acquiescence in the operation of it is an irrefragable proof, that the extreme case does not exist, which alone could justify our setting it aside.

In the next place, this approving opinion of the citizens is requisite, as the best preventive of the ill consequences of a measure always so delicate, and often so hazardous. Individuals would, in that case at least, attempt to repel the opprobrium that would be thrown upon congress by those who will charge it with perfidy. They would give weight to the testimony of facts, and the authority of principles, on which the government would rest its vindication: and if war should ensue upon the violation, our citizens would not be divided from their government, nor the ardour of their courage be chilled by the consciousness of injustice, and the sense of humiliation, that sense which makes those despicable who know they are despised.

I add a third reason, and with me it has a force that no words of mine can augment, that a government wantonly refusing to fulfil its engagement is the corrupter of its citizens. Will the laws continue to prevail in the hearts of the people, when the respect that gives them efficacy is withdrawn from the legislators? How shall we punish vice, while we practise it? We have not force, and none will be our reliance, when we have forfeited the resources

of opinion. To weaken government, and to corrupt morals, are effects of a breach of faith not to be prevented; and from effects they become causes, producing with augmented activity, more disorder and more corruption: order will be disturbed, and the life of the public liberty shortened.

And who, I would inquire, is hardy enough to pretend, that the public voice demands the violation of the treaty? The evidence of the sense of the great mass of the nation is often equivocal; but when was it ever manifested with more energy and precision than at the present moment? The voice of the people is raised against the measure of refusing the appropriations. If gentlemen should urge, nevertheless, that all this sound of alarm is a counterfeit expression of the sense of the public, I will proceed to other proofs. Is the treaty ruinous to our commerce? What has blinded the eyes of the merchants and traders? Surely they are not enemies to trade, nor ignorant of their own interests. Their sense is not so liable to be mistaken as that of a nation, and they are almost unanimous. The articles stipulating the redress of our injuries by captures on the sea, are said to be delusive. By whom is this said? The very men whose fortunes are staked upon the competency of that redress, say no such thing. They wait with anxious fear, lest you should annul that compact, on which all their hopes are rested.

Thus we offer proof, little short of absolute demonstration, that the voice of our country is raised not to sanction, but to deprecate, the non-performance of our engagements. It is not the nation, it is one, and but one, branch of the government that proposes to reject them. With this aspect of things, to reject is an act of desperation.

I shall be asked, why a treaty so good in some articles, and so harmless in others, has met with such unrelenting opposition? and how the clamours against it from New-Hampshire to Georgia can be accounted for? The appre-

hensions so extensively diffused, on its first publication, will be vouched as proof, that the treaty is bad, and that the people hold it in abhorrence.

I am not embarrassed to find the answer to this insinuation. Certainly a foresight of its pernicious operation could not have created all the fears that were felt or affected: the alarm spread faster than the publication of the treaty: there were more critics than readers. Besides, as the subject was examined, those fears have subsided. The movements of passion are quicker than those of the understanding: we are to search for the causes of first impressions, not in the articles of this obnoxious and misrepresented instrument, but in the state of the public feeling.

The fervour of the revolution war had not entirely cooled, nor its controversies ceased, before the sensibility of our citizens was quickened with a tenfold vivacity by a new and extraordinary subject of irritation. One of the two great nations of Europe underwent a change, which has attracted all our wonder, and interested all our sympathy. Whatever they did, the zeal of many went with them, and often went to excess. These impressions met with much to inflame, and nothing to restrain them. In our newspapers, in our feasts, and some of our elections, enthusiasm was admitted a merit, a test of patriotism; and that made it contagious. In the opinion of party, we could not love or hate enough. I dare say, in spite of all the obloquy it may provoke, we were extravagant in both. It is my right to avow, that passions so impetuous, enthusiasm so wild, could not subsist without disturbing the sober exercise of reason, without putting at risk the peace and precious interests of our country. They were hazarded. I will not exhaust the little breath I have left, to say how much, nor by whom, or by what means they were rescued from the sacrifice. Shall I be called upon to offer my

proofs? They are here, they are every where. No one has forgotten the proceedings of 1794. No one has forgotten the captures of our vessels, and the imminent danger of war. The nation thirsted not merely for reparation but vengeance. Suffering such wrongs and agitated by such resentments, was it in the power of any words of compact, or could any parchment with its seals prevail at once to tranquillize the people? It was impossible. Treaties in England are seldom popular, and least of all, when the stipulations of amity succeed to the bitterness of hatred. Even the best treaty, though nothing be refused, will choak resentment, but not satisfy it. Every treaty is as sure to disappoint extravagant expectations, as to disarm extravagant passions. Of the latter, hatred is one that takes no bribes: they who are animated by the spirit of revenge, will not be quieted by the possibility of profit.

Why do they complain, that the West Indies are not laid open? Why do they lament, that any restriction is stipulated on the commerce of the East Indies? Why do they pretend, that if they reject this, and insist upon more, more will be accomplished? Let us be explicit—more would not satisfy. If all was granted, would not a treaty of amity with Great Britain still be obnoxious? Have we not this instant heard it urged against our envoy, that he was not ardent enough in his hatred of Great Britain? A treaty of amity is condemned because it was not made by a foe, and in the spirit of one. The same gentleman, at the same instant, repeats a very prevailing objection, that no treaty should be made with the enemy of France. No treaty exclaim others, should be made with a monarch or a despot: there will be no naval security while those sea robbers domineer on the ocean: their den must be destroyed: that nation must be extirpated.

I like this, sir, because it is sincerity. With feelings such as these, we do not pant for treaties: such passions

seek nothing, and will be content with nothing, but the destruction of their object. If a treaty left king George his island, it would not answer, not if he stipulated to pay rent for it. It has been said, the world ought to rejoice, if Britain was sunk in the sea; if, where there are now men and wealth, and laws, and liberty, there was no more than a sand bank for the sea monsters to fatten on, a space for the storms of the ocean to mingle in conflict.

I object nothing to the good sense or humanity of all this. I yield the point, that this is a proof that the age of reason is in progress. Let it be philanthropy, let it be patriotism, if you will; but it is no indication, that any treaty would be approved. The difficulty is not to overcome the objections to the terms; it is to restrain the repugnance to any stipulations of amity with the party.

Having alluded to the rival of Great Britain, I am not unwilling to explain myself: I affect no concealment, and I have practised none. While those two great nations agitate all Europe with their quarrels, they will both equally endeavour to create an influence in America: each will exert all its arts to range our strength on its own side. How is this to be effected? our government is a democratical republic: it will not be disposed to pursue a system of politics, in subservience to either France or England, in opposition to the general wishes of the citizens: and, if congress should adopt such measures, they would not be pursued long, nor with much success. From the nature of our government, popularity is the instrument of foreign influence. Without it, all is labour and disappointment: with that mighty auxiliary, foreign intrigue finds agents, not only volunteers, but competitors for employment, and any thing like reluctance is understood to be a crime. Has Britain this means of influence? Certainly not. If her gold could buy adherents, their becoming such would deprive them of all political power and

importance. They would not wield popularity as a weapon, but would fall under it. Britain has no influence, and for the reasons just given can have none. She has enough; and God forbid she ever should have more. France, possessed of popular enthusiasm, of party attachments, has had, and still has, too much influence on our politics: any foreign influence is too much and ought to be destroyed. I detest the man, and disdain the spirits, that can bend to a mean subserviency to the view of any nation. It is enough to be Americans: that character comprehends our duties, and ought to engross our attachments.

But I would not be misunderstood. I would not break the alliance with France: I would not have the connection between the two countries even a cold one. It should be cordial and sincere; but I would banish that influence, which, by acting on the passions of the citizens, may acquire a power over the government.

It is no bad proof of the merit of the treaty, that under all these unfavourable circumstances, it should be so well approved. In spite of first impressions, in spite of misrepresentation and party clamor, inquiry has multiplied its advocates; and at last the public sentiment appears to me clearly preponderating to its side.

On the most careful review of the several branches of the treaty, those which respect political arrangements, the spoliations on our trade, and the regulation of commerce, there is little to be apprehended; the evil, aggravated as it is by party, is little in degree, and short in duration—two years from the end of the European war. I ask, and I would ask the question significantly, what are the inducements to reject the treaty? What great object is to be gained, and fairly gained by it? If, however, as to the merits of the treaty, candour should suspend its approbation, what is there to hold patriotism a moment in balance as to the violation of it? Nothing. I repeat confidently,

nothing. There is nothing before us in that event, but confusion and dishonour.

But before I attempt to develop those consequences, I must put myself at ease by some explanation. Nothing is worse received among men, than the confutation of their opinions; and, of these, none are more dear or more vulnerable than their political opinions. To say, that a proposition leads to shame and ruin, is almost equivalent to a charge, that the supporters of it intend to produce them. I throw myself upon the magnanimity and candour of those who hear me. I cannot do justice to my subject without exposing, as forcibly as I can, all the evils in prospect. I readily admit, that in every science, and most of all in politics, error springs from other sources than the want of sense or integrity. I despise indiscriminate professions of candour and respect. There are individuals opposed to me, of whom I am not bound to say any thing; but of many, perhaps of a majority of the opposers of the appropriations, it gives me pleasure to declare, they possess my confidence and regard. There are among them individuals, for whom I entertain a cordial affection.

The consequences of refusing to make provision for the treaty are not all to be foreseen. By rejecting, vast interests are committed to the sport of the winds: chance becomes the arbiter of events, and it is forbidden to human foresight to count their number, or measure their extent. Before we resolve to leap into this abyss, so dark and so profound, it becomes us to pause, and reflect upon such of the dangers as are obvious and inevitable. If this assembly should be wrought into a temper to defy these consequences, it is vain, it is deceptive to pretend, that we can escape them. It is worse than weakness to say, that, as to public faith, our vote has already settled the question. Another tribunal than our own is already erected: the public opinion, not merely of our own country, but of the

enlightened world, will pronounce a judgment that we cannot resist, that we dare not even affect to despise.

Well may I urge it to men, who know the worth of character, that it is no trivial calamity to have it contested. Refusing to do what the treaty stipulates shall be done, opens the controversy. Even if we should stand justified at last, a character that is vindicated is something worse than it stood before, unquestioned and unquestionable. Like the plaintiff in an action of slander, we recover a reputation disfigured by invective, and even tarnished by too much handling. In the combat for the honour of the nation, it may receive some wounds, which, though they should heal, will leave scars. I need not say, for surely the feelings of every bosom have anticipated, that we cannot guard this sense of national honour, this ever living fire, which alone keeps patriotism warm in the heart, with a sensibility too vigilant and jealous. If, by executing the treaty, there is no possibility of dishonour, and if, by rejecting, there is some foundation for doubt and for reproach; it is not for me to measure; it is for your own feelings to estimate the vast distance that divides the one side of the alternative from the other.

If therefore we should enter on the examination of the question of duty and obligation with some feelings of prepossession, I do not hesitate to say, they are such as we ought to have: it is an after inquiry to determine, whether they are such as ought finally to be resisted.

The resolution (Mr. Blount's) is less explicit than the constitution. Its patrons should have made it more so, if possible, if they had any doubts, or meant the public should entertain none. Is it the sense of that vote, as some have insinuated, that we claim a right, for any cause or no cause at all, but our own sovereign will and pleasure, to refuse to execute, and thereby to annul the stipulations of a treaty? that we have nothing to regard but the expediency or in expediency of the measure, being absolutely

free from all obligation by compact to give it our sanction? A doctrine so monstrous, so shameless, is refuted by being avowed. There are no words you could express it in, that would not convey both confutation and reproach. It would outrage the ignorance of the tenth century to believe; it would baffle the casuistry of a papal council to vindicate. I venture to say it is impossible. No less impossible that we should desire to assert the scandalous privilege of being free, after we have pledged our honour.

It is doing injustice to the resolution of the house (which I dislike on many accounts) to strain the interpretation of it to this extravagance. The treaty-making power is declared by it to be vested exclusively in the president and senate. Will any man in his senses affirm, that it can be a treaty before it has any binding force or obligation? If it has no binding force upon us, it has none upon Great Britain. Let candour answer, is Great Britain free from any obligation to deliver the posts in June, and are we willing to signify to her, that we think so? Is it with that nation a question of mere expediency or in expediency to do it; and that too, even after we have done all that depends upon us to give the treaty effect? No sober man believes this. No one who would not join in condemning the faithless proceeding of that nation, if such a doctrine should be avowed, and carried into practice: and why complain, if Great Britain is not bound? There can be no breach of faith, where none is plighted. I shall be told, that she is bound. Surely it follows, that, if she is bound to performance, our nation is under a similar obligation: if both parties be not obliged, neither is obliged; it is no compact, no treaty. This is a dictate of law and common sense, and every jury in the country has sanctioned it on oath. It cannot be a treaty and yet no treaty, a bargain and yet no promise. If it is a promise, I am not to read a lecture to show, why an honest man will keep his promise.

The reason of the thing, and the words of the resolution of the house, imply, that the United States engage their good faith in a treaty. We disclaim, say the majority, the treaty-making power; we of course disclaim (they ought to say) every doctrine, that would put a negative upon the doings of that power. It is the prerogative of folly alone to maintain both sides of the proposition.

Will any man affirm, the American nation is engaged by good faith to the British nation; but that engagement is nothing to this house? Such a man is not to be reasoned with. Such a doctrine is a coat of mail, that would turn the edge of all the weapons of argument, if they were sharper than a sword. Will it be imagined the king of Great Britain and the president are mutually bound by the treaty; but the two nations are free?

It is one thing for this house to stand in a position, that presents an opportunity to break the faith of America, and another to establish a principle that will justify the deed.

We feel less repugnance to believe, that any other body is bound by obligation than our own. There is not a man here, who does not say that Great Britain is bound by treaty. Bring it nearer home. Is the senate bound? Just as much as the house and no more. Suppose the senate, as part of the treaty power, by ratifying a treaty on Monday, pledges the public faith to do a certain act. Then, in their ordinary capacity as a branch of the legislature, the senate is called upon on Tuesday to perform that act, for example, an appropriation of money, is the senate (so lately under obligation) now free to agree or disagree to the act? If the twenty ratifying senators should rise up and avow this principle, saying, we struggle for liberty, we will not be cyphers, mere puppets, and give their votes accordingly, would not shame blister their tongues, would not infamy tingle in their ears, would not their country, which they had insulted and dishonoured, though it

should be silent and forgiving, be a revolutionary tribunal, a rack, on which their own reflections would stretch them?

This, sir, is a cause, that would be dishonoured and betrayed, if I contented myself with appealing only to the understanding. It is too cold, and its processes are too slow for the occasion. I desire to thank God, that, since he has given me an intellect so fallible, he has impressed upon me an instinct that is sure. On a question of shame and honour, reasoning is sometimes useless, and worse. I feel the decision in my pulse: if it throws no light upon the brain, it kindles a fire at the heart.

It is not easy to deny, it is impossible to doubt, that a treaty imposes an obligation on the American nation. It would be childish to consider the president and senate obliged, and the nation and house free. What is the obligation? perfect or imperfect? If perfect, the debate is brought to a conclusion. If imperfect, how large a part of our faith is pawned? Is half our honour put at risk, and is that half too cheap to be redeemed? How long has this hair-splitting subdivision of good faith been discovered, and why has it escaped the researches of the writers on the law of nations? Shall we add a new chapter to that law; or insert this doctrine as a supplement to, or more properly a repeal of the ten commandments?

The principles and the example of the British parliament have been alleged to coincide with the doctrine of those, who deny the obligation of the treaty. I have not had the health to make very laborious researches into this subject; I will, however, sketch my view of it. Several instances have been noticed; but the treaty of Utrecht is the only one that seems to be at all applicable. It has been answered, that the conduct of parliament in that celebrated example affords no sanction to our refusal to carry the treaty into effect. The obligation of the treaty of

Utrecht has been understood to depend on the concurrence of parliament, as a condition of its becoming of force. If that opinion should, however, appear incorrect, still the precedent proves, not that the treaty of Utrecht wanted obligation, but that parliament disregarded it: a proof, not of the construction of the treaty-making power, but of the violation of a national engagement. Admitting still further, that the parliament claimed and exercised its power, not as a breach of faith, but as a matter of constitutional right, I reply that the analogy between parliament and congress totally fails. The nature of the British government may require and justify a course of proceeding in respect to treaties, that is unwarrantable here.

The British government is a mixed one. The king at the head of the army, of the hierarchy, with an ample civil list, hereditary, irresponsible, and possessing the prerogative of peace and war, may be properly observed with some jealousy, in respect to the exercise of the treaty-making power. It seems, and perhaps from a spirit of caution on this account, to be their doctrine, that treaties bind the nation, but are not to be regarded by the courts of law, until laws have been passed conformably to them. Our constitution has expressly regulated the matter differently. The concurrence of parliament is necessary to treaties becoming laws in England, gentlemen say; and here the senate, representing the states, must concur in treaties. The constitution, and the reason of the case make the concurrence of the senate as effectual as the sanction of parliament; and why not? The senate is an elective body, and the approbation of a majority of the states affords the nation as ample security against the abuse of the treaty-making power, as the British nation can enjoy in the control of parliament.

Whatever doubt there may be as to the parliamentary doctrine of the obligation of treaties in Great Britain (and

perhaps there is some) there is none in their books, or their modern practice. Blackstone represents treaties as of the highest obligation, when ratified by the king: and for almost a century, there has been no instance of opposition by parliament to this doctrine. Their treaties have been uniformly carried into effect, although many have been ratified of a nature most obnoxious to party, and have produced a louder clamour than we have lately witnessed. The example of England, therefore, fairly examined, does not warrant, it dissuades us from a negative vote.

Gentlemen have said, with spirit, whatever the true doctrine of our constitution may be, Great Britain has no right to complain or to dictate an interpretation: the sense of the American nation, as to the treaty power, is to be received by all foreign nations. This is very true as a maxim; but the fact is against those who vouch it: the sense of the American nation is *NOT* as the vote of the house has declared it. Our claim to some agency in giving force and obligation to treaties, is beyond all kind of controversy *NOVEL*. The sense of the nation is probably against it: the sense of the government certainly is. The president denies it on constitutional grounds, and therefore cannot ever accede to our interpretation. The senate ratified the treaty, and cannot without dishonour adopt it, as I have attempted to show. Where then do they find the proof, that this is the American sense of the treaty-making power, which is to silence the murmurs of Great Britain? Is it because a majority of two or three, or, at the most, four or five of this house will reject the treaty? Is it thus the sense of our nation is to be recognized? Our government may thus be stopped in its movements: a struggle for power may thus commence, and the event of the conflict may decide, who is the victor, and the quiet possessor of the treaty power. But, at present, it is beyond all credibility, that our vote by a bare

majority, should be believed to do any thing better than to embitter our divisions, and to tear up the settled foundations of our departments.

If the obligation of a treaty be complete, I am aware that cases sometimes exist, which will justify a nation in refusing a compliance. *Are our liberties*, gentlemen demand, *to be bartered away by a treaty, and is there no remedy?* There is. Extremes are not to be supposed; but, when they happen, they make the law for themselves. No such extreme can be pretended in this instance; and, if it existed, the authority it would confer to throw off the obligation would rest where the obligation itself resides, in the nation. This house is not the nation; it is not the whole delegated authority of the nation. Being only a part of that authority, its right to act for the whole society obviously depends on the concurrence of the other two branches. If they refuse to concur, a treaty once made remains of full force, although a breach on the part of the foreign nation would confer upon our own a right to forbear the execution. I repeat it, even in that case, the act of this house cannot be admitted as the act of the nation; and if the president and senate should not concur, the treaty would be obligatory.

I put a case that will not fail to produce conviction. Our treaty with France engages, that free bottoms shall make free goods; and how has it been kept? As such engagements will ever be in time of war. France has set it aside, and pleads imperious necessity. We have no navy to enforce the observance of such articles, and paper barriers are weak against the violence of those, who are on the scramble for enemy's goods on the high seas. The breach of any article of the treaty by one nation gives an undoubted right to the other to renounce the whole treaty. But has one branch of the government that right, or must it reside with the whole authority of the nation? What if

the senate should resolve, that the French treaty is broken, and therefore null and of no effect? The answer is obvious; you would deny their sole authority. That branch of the legislature has equal power, in this regard, with the house of representatives: one branch alone cannot express the will of the nation.

A right to annul a treaty, because a foreign nation has broken its articles, is only like the case of a sufficient cause to repeal a law. In both cases, the branches of our government must concur in the orderly way, or the law and the treaty will remain.

The very cases supposed by my adversaries in this argument, conclude against themselves. They will persist in confounding ideas, that should be kept distinct; they will suppose, that the house of representatives has *no* power unless it has *all* power: the house is nothing, if it be not the whole government, the nation.

On every hypothesis, therefore, the conclusion is not to be resisted: we are either to execute this treaty, or break our faith.

To expatiate on the value of public faith may pass with some men for declamation: to such men I have nothing to say. To others I will urge, can any circumstance mark upon a people more turpitude and debasement? Can any thing tend more to make men think themselves mean, or degrade to a lower point their estimation of virtue and their standard of action? It would not merely demoralize mankind; it tends to break all the ligaments of society, to dissolve that mysterious charm which attracts individuals to the nation, and to inspire in its stead a repulsive sense of shame and disgust.

What is patriotism? Is it a narrow affection for the spot where a man was born? Are the very clods where we tread entitled to this ardent preference, because they are greener? No, sir, this is not the character of the virtue, and it soars

higher for its object. It is an extended self-love, mingling with all the enjoyments of life, and twisting itself with the minutest filaments of the heart. It is thus we obey the laws of society, because they are the laws of virtue. In their authority we see, not the array of force and terror, but the venerable image of our country's honour. Every good citizen makes that honour his own, and cherishes it not only as precious, but as sacred. He is willing to risk his life in its defence; and is conscious that he gains protection, while he gives it. For what rights of a citizen will be deemed inviolable, when a state renounces the principles that constitute their security? Or, if his life should not be invaded, what would its enjoyments be in a country odious in the eyes of strangers, and dishonoured in his own? Could he look with affection and veneration to such a country as his parent? The sense of having one would die within him; he would blush for his patriotism, if he retained any, and justly, for it would be a vice: he would be a banished man in his native land.

I see no exception to the respect that is paid among nations to the law of good faith. If there are cases in this enlightened period when it is violated, there are none when it is decried. It is the philosophy of politics, the religion of governments. It is observed by barbarians: a whiff of tobacco smoke, or a string of beads, gives not merely binding force, but sanction to treaties. Even in Algiers, a truce may be bought for money; but, when ratified, even Algiers is too wise or too just to disown or annul its obligation. Thus we see, neither the ignorance of savages, nor the principles of an association for piracy and rapine, permit a nation to despise its engagements. If, sir, there could be a resurrection from the foot of the gallows, if the victims of justice could live again, collect together and form a society, they would, however loath, soon find themselves obliged to make justice, that justice

under which they fell, the fundamental law of their state. They would perceive it was their interest to make others respect, and they would therefore soon pay some respect themselves to the obligations of good faith.

It is painful, I hope it is superfluous, to make even the supposition, that America should furnish the occasion of this opprobrium. No, let me not even imagine, that a republican government, sprung, as our own is, from a people enlightened and uncorrupted, a government whose origin is right, and whose daily discipline is duty, can, upon solemn debate, make its option to be faithless; can dare to act what despots dare not avow, what our own example evinces the states of Barbary are unsuspected of. No, let me rather make the supposition, that Great Britain refuses to execute the treaty, after we have done every thing to carry it into effect. Is there any language of reproach pungent enough to express your commentary on the fact? What would you say, or, rather, what would you not say? Would you not tell them, wherever an Englishman might travel, shame would stick to him: he would disown his country. You would exclaim, England, proud of your wealth, and arrogant in the possession of power, blush for these distinctions, which become the vehicles of your dishonour. Such a nation might truly say to corruption, thou art my father, and to the worm, thou art my mother and my sister. We should say of such a race of men, their name is a heavier burden than their debt.

I can scarcely persuade myself to believe, that the consideration I have suggested, requires the aid of any auxiliary; but, unfortunately, auxiliary arguments are at hand. Five millions of dollars, and probably more, on the score of spoliations committed on our commerce, depend upon the treaty: the treaty offers the only prospect of indemnity. Such redress is promised as the merchants place some confidence in. Will you interpose and frustrate that hope,

leaving to many families nothing but beggary and despair? It is a smooth proceeding to take a vote in this body: it takes less than half an hour to call the yeas and nays, and reject the treaty. But what is the effect of it? What but this: the very men, formerly so loud for redress, such fierce champions, that even to ask for justice was too mean and too slow, now turn their capricious fury upon the sufferers, and say, by their vote, to them and their families, no longer eat bread: petitioners go home and starve: we cannot satisfy your wrongs, and our resentments.

Will you pay the sufferers out of the treasury? No. The answer was given two years ago, and appears on our journals. Will you give them letters of marque and reprisal, to pay themselves by force? No. That is war. Besides it would be an opportunity for those who have already lost much, to lose more. Will you go to war to avenge their injury? If you do, the war will leave you no money to indemnify them. If it should be unsuccessful, you will aggravate existing evils: if successful, your enemy will have no treasure left to give your merchants: the first losses will be confounded with much greater, and be forgotten. At the end of a war there must be a negotiation, which is the very point we have already gained: and why relinquish it? And who will be confident, that the terms of the negotiation, after a desolating war, would be more acceptable to another house of representatives than the treaty before us? Members and opinions may be so changed, that the treaty would then be rejected for being what the present majority say it should be. Whether we shall go on making treaties and refusing to execute them, I know not: of this I am certain, it will be very difficult to exercise the treaty-making power on the new principle, with much reputation or advantage to the country.

The refusal of the posts (inevitable if we reject the treaty) is a measure too decisive in its nature to be neutral

in its consequences. From great causes we are to look for great effects. A plain and obvious one will be, the price of the western lands will fall: settlers will not choose to fix their habitation on a field of battle. Those who talk so much of the interest of the United States should calculate, how deeply it will be affected by rejecting the treaty; how vast a tract of wild land will almost cease to be property. This loss, let it be observed, will fall upon a fund expressly devoted to sink the national debt. What then are we called upon to do? However the form of the vote and the protestations of many may disguise the proceeding, our resolution is in substance, and it deserves to wear the title of a resolution, to prevent the sale of the western lands and the discharge of the public debt.

Will the tendency to Indian hostilities be contested by any one? Experience gives the answer. The frontiers were scourged with war, until the negotiation with Great Britain was far advanced; and then the hostility ceased. Perhaps the public agents of both nations are innocent of fomenting the Indian war, and perhaps they are not. We ought not, however, to expect that neighbouring nations, highly irritated against each other, will neglect the friendship of the savages. The traders will gain an influence, and will abuse it; and who is ignorant that their passions are easily raised and hardly restrained from violence? Their situation will oblige them to choose between this country and Great Britain, in case the treaty should be rejected: they will not be our friends, and at the same time the friends of our enemies.

But am I reduced to the necessity of proving this point? Certainly the very men who charged the Indian war on the detention of the posts, will call for no other proof than the recital of their own speeches. It is remembered, with what emphasis, with what acrimony, they expatiated on the burden of taxes, and the drain of blood and treasure into

the western country, in consequence of Britain's holding the posts. Until the posts are restored, they exclaimed, the treasury and the frontiers must bleed.

If any, against all these proofs, should maintain, that the peace with the Indians will be stable without the posts, to them I will urge another reply. From arguments calculated to produce conviction, I will appeal to the hearts of those who hear me, and ask whether it is not already planted there? I resort especially to the convictions of the western gentlemen, whether, supposing no posts and no treaty, the settlers will remain in security? Can they take it upon them to say, that an Indian peace, under these circumstances, will prove firm? No, sir, it will not be peace, but a sword; it will be no better than a lure to draw victims within the reach of the tomahawk.

On this theme, my emotions are unutterable. If I could find words for them, if my powers bore any proportion to my zeal, I would swell my voice to such a note of remonstrance, it should reach every log-house beyond the mountains. I would say to the inhabitants, wake from your false security: your cruel dangers, your more cruel apprehensions are soon to be renewed: the wounds, yet unhealed, are to be torn open again: in the day time, your path through the woods will be ambushed; the darkness of midnight will glitter with the blaze of your dwellings. You are a father—the blood of your sons shall fatten your corn-field: you are a mother—the war-hoop shall wake the sleep of the cradle.

On this subject you need not expect any deception on your feelings: it is a spectacle of horror, which cannot be over drawn. If you have nature in your hearts, they will speak a language, compared with which all I have said or can say will be poor and frigid.

Will it be whispered, that the treaty has made me a new champion for the protection of the frontiers. It is known,

that my voice as well as vote have been uniformly given in conformity with the ideas I have expressed. Protection is the right of the frontiers; it is our duty to give it.

Who will accuse me of wandering out of the subject? Who will say, that I exaggerate the tendencies of our measures? Will any one answer by a sneer, that all this is idle preaching. Will any one deny, that we are bound, and I would hope to good purpose, by the most solemn sanctions of duty for the vote we give? Are despots alone to be reproached for unfeeling indifference to the tears and blood of their subjects? Are republicans unresponsible? Have the principles, on which you ground the reproach upon cabinets and kings, no practical influence, no binding force? Are they merely themes of idle declamation, introduced to decorate the morality of a news-paper essay, or to furnish pretty topics of harangue from the windows of that state-house? I trust it is neither too presumptuous nor too late to ask: Can you put the dearest interest of society at risk, without guilt, and without remorse?

It is vain to offer as an excuse, that public men are not to be reproached for the evils that may happen to ensue from their measures. This is very true, where they are unforeseen or inevitable. Those I have depicted are not unforeseen: they are so far from inevitable, we are going to bring them into being by our vote: we choose the consequences, and become as justly answerable for them, as for the measure that we know will produce them.

By rejecting the posts, we light the savage fires, we bind the victims. This day we undertake to render account to the widows and orphans whom our decision will make, to the wretches that will be roasted at the stake, to our country, and I do not deem it too serious to say, to conscience and to God. We are answerable; and if duty be any thing more than a word of imposture, if conscience be

not a bugbear, we are preparing to make ourselves as wretched as our country.

There is no mistake in this case, there can be none: experience has already been the prophet of events, and the cries of our future victims have already reached us. The western inhabitants are not a silent and uncomplaining sacrifice. The voice of humanity issues from the shade of the wilderness: it exclaims, that, while one hand is held up to reject this treaty, the other grasps a tomahawk. It summons our imagination to the scenes that will open. It is no great effort of the imagination to conceive that events so near are already begun. I can fancy that I listen to the yells of savage vengeance and the shrieks of torture: already they seem to sigh in the western wind; already they mingle with every echo from the mountains.

It is not the part of prudence to be inattentive to the tendencies of measures: where there is any ground to fear that these will be pernicious, wisdom and duty forbid that we should under-rate them. If we reject the treaty, will our peace be as safe as if we execute it with good faith? I do honour to the intrepid spirits of those who say it will. It was formerly understood to constitute the excellence of a man's faith, to believe without evidence and against it.

But, as opinions on this article are changed, and we are called to act for our country, it becomes us to explore the dangers that will attend its peace, and avoid them if we can. Few of us here, and fewer here in proportion of our constituents, will doubt, that, by rejecting, all those dangers will be aggravated.

The idea of war is treated as a bugbear. This levity is at least unseasonable, and most of all unbecoming some who resort to it. Who has forgotten the philippics of 1794? The cry then was, reparation; no envoy; no treaty; no tedious delays. Now it seems the passion subsides, or

at least the hurry to satisfy it. Great Britain, say they, will not wage war upon us.

In 1794, it was urged by those who now say, no war, that, if we built frigates, or resisted the piracies of Algiers, we could not expect peace. Now they give excellent comfort truly. Great Britain has seized our vessels and cargoes to the amount of millions; she holds the posts; she interrupts our trade, say they, as a neutral nation; and these gentlemen, formerly so fierce for redress, assure us, in terms of the sweetest consolation, Great Britain will bear all this patiently. But let me ask the late champions of our rights, will our nation bear it? Let others exult because the aggressor will let our wrongs sleep for ever. Will it add, it is my duty to ask, to the patience and quiet of our citizens to see their rights abandoned? Will not the disappointment of their hopes, so long patronised by the government, now in the crisis of their being realized, convert all their passions into fury and despair?

Are the posts to remain for ever in the possession of Great Britain? Let those who reject them, when the treaty offers them to our hands, say, if they choose, they are of no importance. If they are, will they take them by force? The argument I am urging would then come to a point. To use force is war; to talk of treaty again is too absurd: the posts and redress must come from voluntary good will, treaty, or war. The conclusion is plain: if the state of peace shall continue, so will the British possession of the posts.

Look again at this state of things: on the sea coast, vast losses uncompensated; on the frontier, Indian war, and actual encroachment on our territory; every where discontent; resentments tenfold more fierce because they will be impotent and humbled; national discord and abasement. The disputes of the old treaty of 1783, being left to rankle, will revive the almost extinguished ani-

mosities of that period. Wars in all countries, and most of all in such as are free, arise from the impetuosity of the public feelings. The despotism of Turkey is often obliged by clamour to unsheath the sword. War might perhaps be delayed, but could not be prevented: the causes of it would remain, would be aggravated, would be multiplied, and soon become intolerable. More captures, more impressments would swell the list of our wrongs, and the current of our rage. I make no calculation of the arts of those whose employment it has been, on former occasions, to fan the fire; I say nothing of the foreign money and emissaries that might foment the spirit of hostility, because the state of things will naturally run to violence: with less than their former exertion, they would be successful.

Will our government be able to temper and restrain the turbulence of such a crisis? The government, alas! will be in no capacity to govern. A divided people, and divided counsels! Shall we cherish the spirit of peace, or show the energies of war? Shall we make our adversary afraid of our strength, or dispose him, by the measures of resentment and broken faith, to respect our rights? Do gentlemen rely on the state of peace, because both nations will be worse disposed to keep it? because injuries, and insults still harder to endure, will be mutually offered.

Such a state of things will exist, if we should long avoid war, as will be worse than war: peace without security, accumulation of injury without redress, or the hope of it, resentment against the aggressor, contempt for ourselves, intestine discord, and anarchy. Worse than this need not be apprehended, for if worse could happen, anarchy would bring it. Is this the peace gentlemen undertake, with such fearless confidence, to maintain? Is this the station of American dignity, which the high-spirited champions of our national independence and honour could endure;

may, which they are anxious and almost violent to seize for the country? What is there in the treaty that could humble us so low? Are they the men to swallow their resentments, who so lately were choking with them? If in the case contemplated by them, it should be peace, I do not hesitate to declare, it ought not to be peace.

Is there any thing in the prospect of the interior state of the country, to encourage us to aggravate the dangers of a war? Would not the shock of that evil produce another, and shake down the feeble and then unbraced structure of our government? Is this a chimera? Is it going off the ground of matter of fact to say, the rejection of the appropriation proceeds upon the doctrine of a civil war of the departments. Two branches have ratified a treaty; and we are going to set it aside. How is this disorder in the machine to be rectified? While it exists, its movements must stop; and when we talk of a remedy, is that any other than the formidable one of a revolutionary interposition of the people? And is this, in the judgment even of my opposers, to execute, to preserve the constitution, and the public order? Is this the state of hazard, if not of convulsion, which they can have the courage to contemplate and to brave; or beyond which their penetration can reach and see the issue? They seem to believe, and they act as if they believed, that our union, our peace, our liberty, are invulnerable and immortal; as if our happy state was not to be disturbed by our dissensions, and that we are not capable of falling from it by our unworthiness. Some of them have no doubt better nerves and better discernment than mine. They can see the bright aspects and happy consequences of all this array of horrors. They can see intestine discords, our government disorganized, our wrongs aggravated, multiplied and unredressed, peace with dishonour, or war without justice, union, or resources, in "the calm lights of mild philosophy."

But whatever they may anticipate as the next measure of prudence and safety, they have explained nothing to the house. After rejecting the treaty, what is to be the next step? They must have foreseen what ought to be done; they have doubtless resolved what to propose. Why then are they silent? Dare they not now avow their plan of conduct, or do they wait until our progress towards confusion shall guide them in forming it?

Let me cheer the mind, weary no doubt and ready to despond on this prospect, by presenting another which it is yet in our power to realize. Is it possible for a real American to look at the prosperity of this country, without some desire for its continuance, without some respect for the measures which, many will say, produced, and all will confess have preserved it? Will he not feel some dread, that a change of system will reverse the scene? The well grounded fears of our citizens, in 1794, were removed by the treaty, but are not forgotten. Then they deemed war nearly inevitable, and would not this adjustment have been considered at that day as a happy escape from the calamity? The great interest and the general desire of our people was to enjoy the advantages of neutrality. This instrument, however misrepresented, affords America that inestimable security. The causes of our disputes are either cut up by the roots, or referred to a new negotiation, after the end of the European war. This was gaining every thing, because it confirmed our neutrality, by which our citizens are gaining every thing. This alone would justify the engagements of the government. For, when the fiery vapours of the war lowered in the skirts of our horizon, all our wishes were concentrated in this one, that we might escape the desolation of the storm. This treaty, like a rainbow on the edge of the cloud, marked to our eyes the space where it was raging, and afforded at the same time the sure prognostic of fair

weather. If we reject it, the vivid colours will grow pale, it will be a baleful meteor portending tempest and war.

Let us not hesitate then to agree to the appropriation to carry it into faithful execution. Thus we shall save the faith of our nation, secure its peace, and diffuse the spirit of confidence and enterprise that will augment its prosperity. The progress of wealth and improvement is wonderful, and some will think, too rapid. The field for exertion is fruitful and vast, and if peace and good government should be preserved, the acquisitions of our citizens are not so pleasing as the proofs of their industry, as the instruments of their future success. The rewards of exertion go to augment its power. Profit is every hour becoming capital. The vast crop of our neutrality is all seed wheat, and is sown again, to swell, almost beyond calculation, the future harvest of prosperity. In this progress what seems to be fiction is found to fall short of experience.

I rose to speak under impressions that I would have resisted if I could. Those who see me will believe, that the reduced state of my health has unfitted me, almost equally, for much exertion of body or mind. Unprepared for debate by careful reflection in my retirement, or by long attention here, I thought the resolution I had taken, to sit silent, was imposed by necessity, and would cost me no effort to maintain. With a mind thus vacant of ideas, and sinking, as I really am, under a sense of weakness, I imagined the very desire of speaking was extinguished by the persuasion that I had nothing to say. Yet when I come to the moment of deciding the vote, I start back with dread from the edge of the pit into which we are plunging. In my view, even the minutes I have spent in expostulation have their value, because they protract the crisis, and the short period in which alone we may resolve to escape it.

I have thus been led by my feelings to speak more at length than I had intended. Yet I have perhaps as little personal interest in the event as any one here. There is, I believe, no member, who will not think his chance to be a witness of the consequences greater than mine. If, however, the vote should pass to reject, and a spirit should rise, as it will, with the public disorders to make "confusion worse confounded," even I, slender and almost broken as my hold upon life is, may outlive the government and constitution of my country.

SPEECH OF MR. MORRIS,

ON THE JUDICIARY ESTABLISHMENT.

DURING the presidency of Mr. Adams, several tribunals of the United States were established, under the denomination of *Circuit Courts*. The succeeding administration, deeming these courts unnecessary, proposed to suppress them, and a bill was accordingly brought in for that purpose. The federalists in general considered the measure dangerous and unconstitutional. Their opinion was strenuously contested. Interesting debates ensued; and the following speeches may afford a favorable specimen of the eloquence of both parties on this important occasion.

MR. PRESIDENT,

I had fostered the hope that some gentleman who thinks with me, would have taken upon himself the task of replying to the observations made yesterday and this morning in favour of the motion on your table. But since no gentleman has gone so fully into the subject as it seems to require, I am compelled to request your attention.

We were told yesterday, by the honourable member from Virginia, that our objections were calculated for the bye standers, and made with a view to produce an effect upon the people at large. I know not for whom this charge is intended. I certainly recollect no such observations. As I was personally charged with making a play upon words, it may have been intended for me. But surely, sir, it will be recollected that I declined that paltry game, and declared that I considered the verbal criticism which had been relied on, as irrelevant. If I can recollect what I said, from recollecting well what I thought, and meant to say, sure I am, that I uttered nothing in the style of an appeal to the people. I hope no member of this house has so poor a sense of its dignity as to make such an appeal. As to myself, it is now thirty years since I was called into public office. During that period I have frequently been the servant of the people, always their friend; but at no moment of my life their flatterer, and God forbid that I ever should be. When the honourable gentleman considers the course we have taken, he must see that the observations he has thus pointed can light on no object. I trust that it did not flow from a consciousness of his own intentions. He, I hope, had no view of this sort. If he had, he was much, very much, mistaken. Had he looked round upon those who honour us with their attendance, he would have seen that the splendid flashes of his wit excited no approbatory smile. The countenances of those by whom we were surrounded presented a different spectacle. They were impressed with the dignity of this house; they perceived in it the dignity of the American people, and felt with high and manly sentiment their own participation.

We have been told, sir, by the honourable gentleman from Virginia, that there is no independent part of this government. That in popular governments the form of

every department, as well as the government itself, must depend upon popular opinion. And the honourable member from North Carolina has informed us that there is no check for the overbearing powers of the legislature but the public opinion; and he has been pleased to notice a sentiment I had uttered;—a sentiment which not only fell from my lips, but which flowed from my heart. It has, however, been misunderstood and misapplied. After reminding the house of the dangers to which popular governments are exposed from the influence of designing demagogues upon popular passion, I took the liberty to say, that *we*, we the senate of the United States, are assembled here to save the people from their most *dangerous* enemy, to save them from themselves; to guard them against the baneful effects of their own precipitation, their passion, their misguided zeal. 'Tis but for these purposes that all our constitutional checks are devised. If this be not the language of the constitution, the constitution is all nonsense. For why are the senators chosen by communities, and the representatives directly by the people? Why are the one chosen for a longer term than the other? Why give one branch of the legislature a negative upon the acts of the other? Why give the president a right to arrest the proceedings of both till two-thirds of each should concur? Why all these multiplied precautions, unless to check and control that iniquitous spirit, that headlong torrent of opinion, which has swept away every popular government that ever existed?

With most respectful attention I heard the declaration of the gentleman from Virginia, of his own sentiment: "Whatever," said he, "may be my opinion of the constitution, I hold myself bound to respect it." He disdained, sir, to profess an affection he did not feel, and I accept his candour as a pledge for the performance of his duty. But he will admit this necessary inference from that

frank confession, that although he will struggle (against his inclination) to support the constitution, even to the last moment, yet when in spite of all his efforts it shall fall, he will rejoice in its destruction. Far different are my feelings. It is impossible that we are both prejudiced, and that in taking the ground on which we respectively stand, our judgments are influenced by the sentiments which glow in our hearts. I, sir, wish to support the constitution because I love it. And I love it because I consider it as the bond of our union; because in my soul I believe that on it depends our harmony and our peace; and without it we should soon be involved in civil war; that this country would be deluged with the blood of its inhabitants; and a brother's hand be raised against a brother.

After these preliminary remarks, I hope I shall be indulged, while I consider the subject in reference to the two points which have been taken, the *expediency* and *constitutionality* of the repeal.

In considering the *expediency* I hope I shall be pardoned for asking your attention to some parts of the constitution, which have not yet been dwelt upon, and which tend to elucidate this part of our enquiry. I agree fully with the gentleman, that every section, every sentence, and every word of the constitution ought to be deliberately weighed and examined; nay, I am content to go along with him, and give its due value and importance to every stop and comma. In the beginning we find a declaration of the motives which induced the American people to bind themselves by this compact. And in the foreground of that declaration we find these objects specified; *to form a more perfect union, to establish justice, and insure domestic tranquillity*. But how are these objects effected? The people intended to *establish justice*. What provision have they made to fulfil that intention? After pointing out the courts which should be established, the

second section of the third article informs us, "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state and the citizens thereof, and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases beforementioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make."

Thus then we find that the judicial power *shall* extend to a great variety of cases, but that the supreme court shall have only *appellate* jurisdiction in all admiralty and maritime causes, in all controversies between the United States and private citizens, between citizens and different states, between citizens of the same state claiming lands under different states, and between a citizen of the United States and foreign states, citizens or subjects. The honourable gentleman from Kentucky, who made the motion on your table, has told us that the constitution in its judiciary provisions contemplated only those cases which could not be tried in the state courts. But he will, I hope, pardon me when I contend that the constitution did not merely contemplate, but did by express words reserve to the national tribunals a right to decide, and did secure to the citizens

of America a right to demand their decision in many cases evidently cognizable in the state courts. And what are these cases? They are those in respect to which it is by the constitution presumed that the state courts should not always make a cool and calm investigation, a fair and just decision. To form, therefore, a more perfect union, and to insure domestic tranquillity, the constitution has also said there shall likewise be courts of the union to try causes, by the wrongful decision of which the union might be endangered or domestic tranquillity be disturbed. And what courts? Look again at the cases designated. The supreme court has no *original* jurisdiction. The constitution has said that the judicial powers shall be vested in the *supreme* and *inferior* courts. It has declared that the judicial power so vested shall extend to the cases mentioned, and that the supreme court shall *not* have *original* jurisdiction in those cases. Evidently, therefore, it has declared that they shall (in the first instance) be tried by *inferior* courts, with appeal to the *supreme* court. This, therefore, amounts to a declaration that the *inferior* courts *shall* exist; since without them the citizen is deprived of those rights for which he stipulated, or rather those rights *verbally* granted would be *actually* withheld; and that great security of our union, that necessary guard of our tranquillity, be completely paralyzed, if not destroyed. In declaring then that these tribunals *shall exist*, it equally declares, that the congress *shall* ordain and establish them. I say they *shall*; this is the evident intention, if not the express words, of the constitution. The convention in framing, the American people in adopting, that compact, did not, could not presume, that the congress would omit to do, what they were thus bound to do. They could not presume, that the legislature would hesitate one moment, in establishing the organs necessary to carry into effect those wholesome, those important provisions.

The honourable member from Virginia has given us a history of the judicial system, and in the course of it has told us, that the judges of the supreme court knew, when they accepted their offices, the duties they were to perform and the salaries they were to receive. He thence infers, that if again called on to do the same duties, they have no right to complain. Agreed. But that is not the question between us. Admitting that they have made a hard bargain, and that we may hold them to a strict performance, is it wise to exact their compliance to the injury of our constituents? We are urged to go back to the old system; but let us first examine the effects of that system. The judges of the supreme court rode the circuits, and two of them with the assistance of a district judge held circuit courts and tried causes. *As a supreme court* they have in most cases only an appellate jurisdiction. In the first instance, therefore, they tried a cause sitting *as an inferior court*, and then on appeal tried it over again *as a supreme court*. Thus then the appeal was from the sentence of the judges to the judges themselves. But say, that to avoid this incoherency, you will incapacitate the two judges who sat on the circuit from sitting in the supreme court to receive their own decrees. Strike them off: and suppose, either the same or a contrary decision to have been made on another circuit by two of their brethren in a similar case. For the same reason you strike *them* off, and then you have no court left. Is this wise? Is it safe? You place yourselves in a situation where your citizens must be deprived of a court of appeals, or else run the greatest risk that the decision of the first court will carry with it that of the other.

The same honourable member has given us a history of a law passed the last session, which he wishes now to repeal. That history is accurate at least in one important part of it. I believe that all amendments were rejected,

pertinaciously rejected: and I acknowledge that I joined heartily in that rejection. It was for the clearest reason on earth. We all perfectly understood, that to *amend* the bill was to *destroy* it. That if ever it got back to the other house, it would perish.

Those, therefore, who approved of the general provisions of that bill, were determined to adopt it. We sought the practicable good, and would not in pursuit of unattainable perfection, sacrifice that good to the pride of opinion. We took the bill, therefore, with its imperfections, convinced that when it was once passed into a law, it might be easily amended.

We are now told that this procedure was improper: nay, that it was *indecent*. That *public opinion* had declared itself against us. That a majority (holding different opinions) was *already chosen* to the other house; and that a similar majority *was expected* for that in which we sit. Mr. President, are we then to understand, that opposition to the majority in the two houses of congress is *improper*, is *indecent*? If so, what are we to think of those gentlemen, who not only with proper and decent, but with laudable motives (for such is their claim) so long, so perseveringly, so pertinaciously, opposed that voice of the people, which had so repeatedly, and for so many years, declared itself against them, through the organ of their representatives? Was this indecent in them? If not, how could it be improper for us to seize the only moment which was left for the then majority to do what they deemed a necessary act? Let me again refer to these imperious demands of the constitution, which called us to establish inferior courts. Let me remind gentlemen of their assertion on this floor, that centuries might elapse before any judicial system could be established with general consent. And then, let me ask, being thus impressed with a sense of the duty and of the difficulty of

performing that arduous task, was it not wise to seize the auspicious moment?

Among the many stigmas affixed to this law, we have been told that the president, in selecting men to fill the offices which it created, made vacancies and filled them from the floor of this house. And that but for the influence of this circumstance, a majority in favour of it could not have been found. Let us examine this suggestion. It is grounded on the supposition of corrupt influence derived from a hope, founded on two remote and successive contingencies. First, the vacancy might or might not exist; for it depended as well on the acceptance of another as on the president's grant; and secondly, the president might or might not fill it with a member of this house. Yet on this vague conjecture, it is asserted, that men in high confidence violated their duty. It is hard to determine the influence of self-interest on the heart of man. I shall not, therefore make the attempt. In the present case it is possible, that the imputation may be just, but I hope not, I believe not. At any rate gentlemen will agree with me, that the calculation is uncertain and the conjecture vague.

But let it now, for an argument sake, be admitted; saving always the reputation of honourable men who are not here to defend themselves. Let it, I say, for argument sake be admitted, that the gentlemen alluded to acted under the influence of improper motives. What then? Is a law, that has received the varied assent required by the constitution, and is clothed with all the needful formalities, thereby invalidated? Can you impair its force by impeaching the motives of any member who voted for it? Does it follow, that a law is bad because all those who concurred in it cannot give good reasons for their votes? Must we not judge of it by its intrinsic merit. Is it a fair argument addressed to our understanding, to say we must repeal a law, even a good one, if the enacting of it may

have been effected in any degree by improper motives? Or is the judgment of this house so feeble, that it may not be trusted.

Gentlemen tell us, however, that the law is materially defective, nay, that it is unconstitutional. What follows? Gentlemen bid us repeal it. But is this just reasoning? If the law be only defective, why not amend? And if unconstitutional why repeal? In this case no repeal can be necessary; the law is in itself void; it is a mere dead letter.

To show that it is unconstitutional a particular clause is pointed out, and an inference is made, as in the case of goods, where because there is one contraband article on board, the whole cargo is forfeited. Admit for a moment, that the part alluded to was unconstitutional, this would in no wise affect the remainder. That part would be void, or if you think proper, you can repeal that part.

Let us, however, examine the clause objected to on the ground of the constitution. It is said that by this law the *district* judges in Tennessee and Kentucky are removed from office by making them *circuit judges*. And again, that you have by law appointed two new offices, those of circuit judges, and filled them by law, instead of pursuing the modes of appointment prescribed by the constitution. To prove all this, the gentleman from Virginia did us the favour to read those parts of the law which he condemns, and if I can trust my memory, it is clear from what he read, that the law does not remove these district judges, neither does it appoint them to the office of circuit judges. It does, indeed, put down the district court, but is so far from destroying the offices of district judges, that it declares the persons filling those offices shall perform the duty of holding the circuit courts. And so far is it from appointing circuit judges, that it declares the circuit courts shall be held by the district judges. But gentlemen contend, that to *discontinue* the district courts was in effect to

remove the district judges. This, sir, is so far from being a just inference from the law, that the direct contrary follows as a necessary result: for it is on the principle that these judges continue in office after their courts are discontinued, that the new duty of holding other courts is assigned to them. But gentlemen say, this doctrine militates with the principles we contend for. Surely not. It must be recollected, sir, that we have repeatedly admitted the right of the legislature, to change, alter, modify, and amend the judiciary system, so as best to promote the interest of the people. We only contend, that you should not exceed or contravene the authority by which you act. But, say gentlemen, you forced this new office on the district judges, and this is in effect a new appointment. I answer that the question can only arise on the refusal of those judges to act. But is it unconstitutional to assign new duties to offices already existing? I fear that if this construction be adopted, our labours will speedily end; for we shall be so shackled that we cannot move. What is the practice? Do we not every day call upon particular officers to perform duties not previously assigned to, or required of them? And must the executive in every such case make a new appointment?

But as a further reason to restore, by repealing this law, the old system, an honourable member from North Carolina has told us, the judges of the supreme court should attend in the states to acquire a competent knowledge of local institutions, and for this purpose should continue to ride the circuits. I believe there is great use in sending young men to travel; it tends to enlarge their views, and give them more liberal ideas than they might otherwise possess. Nay, if they reside long enough in foreign countries, they may become acquainted with the manners of the people, and acquire some knowledge of their civil institutions. But I am not quite convinced that riding

rapidly from one end of this country to the other is the best way to study law. I am inclined to believe that knowledge may be more conveniently acquired in the closet than upon the high road. It is, moreover, to be presumed that the first magistrate would, in selecting persons to fill these offices, take the best characters from the different parts of the country, who already possess the needful acquirements. But admitting that the president should not duly exercise in this respect his discretionary powers, and admitting that the ideas of the gentleman are correct, how wretched must be our condition! These, our judges, when called on to exercise their functions, would but begin to learn their trade, and that too at a period of life when the intellectual powers, with no great facility, can acquire new ideas. We must, therefore, have a double set of judges. One set of apprentice judges, to ride circuits and learn; the other set, of master judges, to hold courts and decide controversies.

We are told, sir, that the repeal asked for is important, in that it may establish a precedent; for that it is not merely a question on the propriety of disbanding a corps of sixteen rank and file; but that provision may hereafter be made, not for sixteen, but for sixteen hundred or sixteen thousand judges, and that it may become necessary to turn *them* to the right about. Mr. President, I will not, I cannot presume, that any such provision will ever be made, and therefore I cannot conceive any such necessity; I will not suppose, for I cannot suppose, that any party or faction will ever do any thing so wild, so extravagant. But, I will ask, how does this strange supposition consist with the doctrine of gentlemen, that public opinion is a sufficient check on the legislature, and a sufficient safeguard to the people. Put the case to its consequences, and what becomes of the check? Will gentlemen say it is to be found in the force of this precedent? Is this to con-

trol succeeding rulers in their wild, their mad career? But how? Is the creation of judicial officers the only thing committed to their discretion? Have they not, according to the doctrine contended for, our all, at their disposition, with no other check than public opinion, which, according to the supposition, will not prevent them from committing the greatest follies and absurdities? Take then all the gentleman's ideas and compare them together, it will result that there is an inestimable treasure put into the hands of drunkards, madmen, and fools.

But away with all these derogatory suppositions. The legislature may be trusted. Our government is a system of salutary checks. One legislative branch is a check on the other. And should the violence of party spirit bear both of them away, the president, an officer high in honour, high in the public confidence, charged with weighty concerns, responsible to his own regulation, and to the world, stands ready to arrest their too impetuous course. This is our system. It makes no mad appeal to every mob in the country. It appeals to the sober sense of men selected from their fellow citizens for their talents, for their virtue; of men in advanced life, and of matured judgment. It appeals to their understanding, to their integrity, to their honour, to their love of fame, to their sense of shame. If all these checks should prove insufficient, and, alas! such is the condition of human nature, that I fear they will not always be sufficient, the constitution has given us one more. It has given us an independent judiciary. We have been told that the executive authority carries your laws into execution. But let us not be the dupes of sound. The executive magistrate commands, indeed, your fleets and armies; and duties, imposts, excises, and all other taxes, are collected, and all expenditures are made by officers whom he has appointed. So far he executes your laws. But these his acts do not often apply to in-

dividual concerns. In those cases so important to the peace and happiness of society, the execution of your laws is confided to your judges. And *therefore* are they rendered independent. Before, then, that you violate that independence, pause; there are state sovereignties, as well as the sovereignty of the general government. There are cases, too many cases, in which the interest of one is not considered as the interest of the other. Should these conflict—if the judiciary be gone, the question is no longer of law but of force. This is a state of things which no honest and wise man can view without horror.

Suppose, in the omnipotence of your legislative authority, you trench upon the rights of your fellow citizens, by passing an unconstitutional law: if the judiciary department preserve its vigour, it will stop you short. Instead of a resort to arms, there will be a happier appeal to argument. Suppose a case still more impressive. The president is at the head of your armies. Let one of his generals, flushed with victory, and proud in command, presume to trample on the rights of your most insignificant citizen. Indignant of the wrong, he will demand the protection of your tribunals, and safe in the shadow of their wings, will laugh his oppressor to scorn.

Having now, I believe, examined all the arguments adduced to show the expediency of the motion, and which fairly sifted, reduce themselves at last to these two things: Restore the ancient system, and save the additional expense. Before I close what I have to say on this ground, I hope I shall be pardoned for saying one or two words about the expense. I hope, also, that notwithstanding the epithets which may be applied to my arithmetic, I shall be pardoned for using that which I learnt at school. It may have deceived me when it taught me that two and two make four. But though it should *now* be branded with opprobrious terms, I must *still* believe that two and

two do *still* make four. Gentlemen of newer theories and of higher attainments, while they smile at my inferiority, must bear with my infirmities, and take me as I am.

In all this great system of saving; in all this ostentatious economy, this rage of reform, how happens it that the eagle eye has not yet been turned to the mint? That no one piercing glance has been able to behold the expenditures of that department? I am far from wishing to overturn it. Though it be not of great necessity, nor even of substantial importance, though it be but a splendid trapping of your government; yet, as it may, by impressing on your current coin the emblems of your sovereignty, have some tendency to encourage a national spirit and to foster the national pride, I am willing to contribute my share to its support. Yes, sir, I would foster the national pride; I cannot, indeed, approve of national vanity, nor feed it with vile adulation. But I would gladly cherish the lofty sentiment of national pride. I wish my country to feel like Romans, to be as proud as Englishmen, and going still further, I would wish them to veil their pride in the well bred modesty of French politeness. But can this establishment, the mere decorum of your political edifice, can it be compared with the massy columns on which rest your peace and safety? Shall the striking of a few half-pence be put into a parallel with the distribution of justice? I find, sir, from the estimate on your table, that the salaries of the officers of your mint amount to \$10,600, and that the expenses are estimated at 10,900; making \$21,500.

I find that the actual expenditure of the last year,			
exclusive of salaries, amounted to			\$25,154 44
Add the salaries,	-	-	10,600
We have a total of,			<hr/> 35,654 44

A sum which exceeds the salary of the sixteen judges.

I find further, that during the last year they have coined cents and half cents to the amount of 10,173 dollars and 29 cents. Thus their copper coinage falls a little short of what it costs us for their salaries. We have, however, from this establishment about a million cents, one to each family in America. A little emblematic medal to be hung over their chimney pieces; and this is all their compensation for all that expense. Yet not a word has been said about the mint, while the judges, whose services are much greater, and of so much importance to the community, are to be struck off at a blow, in order to save an expense which, compared with the object, is pitiful. What conclusion then are we to draw from this predilection.

I will not pretend to assign to gentlemen, the motives by which they may be influenced; but if I should permit myself to make the enquiry, the style of so many observations, and more especially the manner, the warmth, the irritability, which has been exhibited on this occasion, would lead to a solution of the problem. I had the honour, sir, when I addressed you the other day, to observe, that I believed the universe could not afford a spectacle more sublime than the view of a powerful state kneeling at the altar of justice, and sacrificing there her passion and her pride. That I once suffered the hope of beholding that spectacle of magnanimity in America. And now what a world of figures, has the gentleman from Virginia formed on his apprehensions of that remark. I never expressed any thing like exultation at the idea of a state ignominiously dragged in triumph at the heels of your judges. But permit me to say, the gentleman's exquisite sensibility on that subject, his alarm and apprehension, all show his strong attachment to state authority. Far be it from me, however, to charge the gentleman with improper motives. I know that his emotions arise

from one of those imperfections in our nature, which we cannot remedy. They are excited by causes which have naturally made him hostile to this constitution, though his duty compels him reluctantly to support it. I hope, however, that those gentlemen, who entertain different sentiments, and who are less irritable on the score of state dignity, will think it essential to preserve a constitution, without which the independent existence of the states themselves will be but of short duration.

This, sir, leads me to the second object I had proposed. I shall therefore pray your indulgence, while I consider how far this measure is *constitutional*. I have not been able to discover the expediency, but will now for argument sake admit it; and here I certainly cannot but express my deep regret for the situation of an honourable member from North Carolina. Bound as he is, by his instructions, arguments, however forcible, can never be effectual. I ought therefore, to wish for his sake, that his mind may not be convinced by any thing I shall say; for hard indeed would be his condition, to be bound by the contrariant obligations of an order and an oath.

I cannot however but express my profound respect for the talents of those who gave him his instructions, and who sitting at a distance, without hearing the arguments, could better understand the subject than the senator on this floor after full discussion.

The honourable member from Virginia has repeated the distinction before taken between the supreme and the inferior tribunals; he has insisted on the distinction between the words *shall* and *may*; has inferred from that distinction, that the judges of the inferior courts are subjects of the legislative discretion, and has contended that the word *may* includes all power respecting the subject to which it is applied, consequently to raise up and to put down, to create and to destroy. I must entreat your

patience, sir, while I go more into this subject than I ever supposed would be necessary. By the article, so often quoted, it is declared "that the judicial power of the United States, *shall* be vested in one supreme court and in such inferior courts, as the Congress *may* from time to time establish." I beg leave to recal your attention to what I have already said of these inferior courts—*That the original jurisdiction of various subjects being given exclusively to them, it became the bounden duty of congress to establish such courts.* I will not repeat the argument already used on that subject. But I will ask those who urge the distinction between the supreme court and the inferior tribunals, whether a law was not previously necessary, before the supreme court be organized. They reply that the constitution says, there *shall* be a supreme court, and therefore the congress are commanded to organize it, while the rest is left to their discretion. This, sir, is not the fact. The constitution says the judicial power shall be vested in *one* supreme court, and in inferior courts. The legislature can therefore only organize one supreme court, but they may establish as many inferior courts as they shall think proper. The designation made of them by the constitution is, such inferior courts as congress may from time to time ordain and *establish*. But why, say gentlemen, fix precisely *one* supreme court, and leave the rest to legislative discretion? The answer is simple. It results from the nature of things, from the existence and probable state of our country. There was no difficulty in deciding, that *one* and *only one* supreme court should be proper or necessary, to which should lie appeals from inferior tribunals. Not so as to these. The United States were advancing in rapid progression—their population of three millions was soon to become five, then ten, afterwards twenty millions. This was well known as far as the future can become an object of human comprehen-

sion. In this increase of numbers, with a still greater increase of wealth, with the extension of our commerce and the progress of the arts, it was evident that although a great many tribunals would become necessary, it was impossible to determine either on the precise number or the most convenient form. The convention did not pretend to this prescience; but, had they possessed it, would it have been proper to have established then all the tribunals necessary for all future times? Would it have been wise to have planted courts among the Chickasaws, the Choctaws, the Cherokees, the Tuscaroras, and God knows how many more, because at some future day the regions over which they roam might be cultivated by polished men?—Was it not proper, wise, necessary, to leave in the discretion of congress, the number and the kind of courts which they might find it proper to *establish* for the purpose designated by the constitution.—This simple statement of facts, facts of public notoriety, is alone a sufficient comment on, and explication of the words on which gentlemen have so much relied. The convention in framing, the people in adopting this compact, say the judicial power shall extend to many cases, the original cognizance whereof shall be by the inferior courts; but it is neither necessary, nor even possible, **no** , to determine their number or their form: *that* essential power therefore, shall vest in such inferior courts as the congress may from time to time, in the progression of time, and according to the indication of circumstances, *establish*. Not *provide*, *ordain*, or *determine*, but *establish*. Not a mere temporary provision, but an *establishment*. If after this it had said in general terms, that *judges* should hold their offices during good behaviour, could a doubt have existed on the interpretation of this act, under all its attending circumstances, that the judges of the inferior courts were intended, as well as those of the su-

preme court? But did the framers of the constitution stop there? Is there then nothing more? Did they risk on these grammatical niceties the fate of America? Did they rest here the most important branch of our government? Little important indeed, as to foreign danger; but infinitely valuable to our domestic peace and to personal protection against the oppression of our rulers. No. Lest a doubt should be raised, they have carefully connected the judges of both courts in the same sentence; they have said "*the judges both of the supreme and inferior courts,*" thus coupling them inseparably together. You may cut the bands but you can never untie them. With salutary caution they devised this clause, to arrest the overbearing temper which they knew belonged to legislative bodies. They do not say the judges simply, but the judges of the supreme and inferior courts shall hold their offices during good behaviour. They say therefore to the legislature, you may judge of the propriety, the utility, the necessity of organizing these courts; but when *established* you have done your duty. Anticipating the course of passion in future times they say to the legislature, you shall not disgrace yourselves by exhibiting the indecent spectacle of judges established by one legislature removed by another. We will save *you* also from yourselves. We say these judges shall hold their offices: and surely, sir, to pretend that they can hold their office after the office is destroyed, is contemptible.

The framers of this constitution had seen much, read much, and deeply reflected. They knew by experience the violence of popular bodies; and let it be remembered that since that day many of the states, taught by experience, have found it necessary to change their forms of government, to avoid the effects of that violence. The convention contemplated the very act you now attempt. They knew also the jealousy and the power of the states;

and they established for your and for their protection, this most important department. I beg gentlemen to hear and to remember what I say. It is this department alone, and it is the independence alone of this department, which can save you from civil war. Yes, sir, adopt the language of gentlemen, say with them, by the act to which you are urged, "If we cannot remove the judges we can destroy them." Establish thus the dependence of the judiciary department. Who will resort to them for protection against you? Who will confide in, who will be bound by their decrees? Are we then to resort to the ultimate reason of kings? Are our arguments to fly from the mouths of our cannon?

We are told that we may violate our constitution, because similar constitutions have been violated elsewhere. Two states have been cited to that effect, Maryland and Virginia. The honourable gentleman from Virginia tells us that when this happened in the state he belongs to, no complaint was made by the judges. I will not enquire what constitutions have been violated. I will not ask either when or where this dangerous practice began, or has been followed. I will admit the fact. What does it prove? Does it prove that because they have violated, we also may violate? Does it not prove directly the contrary? Is it not the strongest reason on earth for preserving the independence of our tribunals? If it be true that they have with strong hand seized *their* courts, and bent them to *their* will, ought we not to give suitors a fair chance for justice in our courts, or must the suffering citizen be deprived of all protection?

The gentleman from Virginia has called our attention to certain cases which he considers as forming necessary exceptions to the principles for which we contend. Permit me to say that necessity is a bad law, and frequently

proves too much; and let the gentleman recollect that arguments which prove too much prove nothing.

He has instanced a case where it may be proper to appoint commissioners for a limited time to settle some particular description of controversies. Undoubtedly it is always in the power of congress to form a board of commissioners for particular purposes. He asks, are *these* inferior courts, and must *they* also exist forever? I answer that the nature of their offices must depend on the law by which they are created; if called to exercise the judicial functions designated by the constitution, they must have existence conformable to its injunctions.

Again, he has instanced the Mississippi territory, claimed by, and which may be surrendered to the state of Georgia, and a part of the union which may be conquered by a foreign enemy. And he asks triumphantly, are our inferior courts to remain after our jurisdiction is gone? This case rests upon a principle so simple, that I am surprised the honourable member did not perceive the answer in the very moment when he made the objection. Is it by our act that a country is taken from us by a foreign enemy? Is it by our consent that our jurisdiction is lost? I had the honour, in speaking the other day, expressly and for the most obvious reasons, to except the case of conquest. As well might we contend for the government of a town swallowed up by an earthquake.

General *Mason* exclaimed—He had supposed the case of territory conquered and afterwards ceded to the conqueror, or some other territory ceded in lieu of it.

Mr. *Morris*—The case is precisely the same. Until after the peace the conquest is not complete. Every body knows that until the cession by treaty, the original owner has the postliminary right to a territory taken from him. Beyond all question, where congress are compelled to cede the territory, the judges can no longer exist, unless

the new sovereign confers the office. Over such a territory the authority of the constitution ceases, and of course the rights which it confers.

It is said the judicial institution is intended for the benefit of the people, and not of the judge; and it is complained of, that in speaking of the office, we say it is *his* office. Undoubtedly the institution is for the benefit of the people. But the question remains, how will it be rendered most beneficial? Is it by making the judge independent, by making it *his* office; or is it by placing him in a state of abject dependence, so that the office shall be his to-day and belong to another to-morrow? Let the gentleman hear the words of the constitution; it speaks of *their* offices, consequently as applied to a single judge, of *his* office, to be exercised by him for the benefit of the people of America, to which exercise his *independence* is as necessary as his office.

The gentleman from Virginia has on this occasion likened the judge to a bridge, and to various other objects; but, I hope for his pardon, if, while I admire the lofty flights of his eloquence, I abstain from noticing observations which I conceive to be utterly irrelevant.

The same honourable member has not only given us his history of the supreme court, but has told us the manner in which they do business, and expressed his fears that having little else to do, they will do mischief. We are not competent, sir, to examine, nor ought we to pre-judge their conduct. I am persuaded that they will do their duty, and presume they will have the decency to believe that we do our duty. In so far as they may be busied with the great mischief of checking the legislature or executive departments, in any wanton invasion of our rights, I shall rejoice in that mischief. I hope indeed they will not be so busied, because I hope we shall give them no cause. But also, I hope they will keep an eagle eye

upon us lest we should. It was partly for this purpose they were established, and I trust that when properly called on they will dare to act. I know this doctrine is unpleasant. I know it is more popular to appeal to the public opinion, that equivocal, transient being, which exists no where and every where. But if ever the occasion calls for it, I trust that the supreme court will not neglect doing the great mischief of saving this constitution, which can be done much better by the deliberations, than by resorting to what are called revolutionary measures.

The honourable member from North Carolina, sore pressed by the delicate situation in which he is placed, thinks he has discovered a new argument in favour of the vote which he is instructed to give. As far as I can enter into his ideas, and trace their progress, he seems to have assumed the position which was to be proved, and then searched through the constitution; not to discover whether the legislature have the right contended for, but whether, admitting them to possess it, there may not be something which might comport with that idea. I shall state the honourable member's argument, as I understand it, and if mistaken, pray to be corrected. He read to us that clause which relates to impeachment, and comparing it with that which fixes the tenure of judicial office, has observed that this clause must relate solely to a removal by the executive power; whose right to remove, though not indeed any where mentioned in the constitution, has been admitted in a practice founded on legislative construction.

That as the tenure of the office is during *good behaviour*, and as the clause respecting impeachment, does not specify *misbehaviour*, there is evidently a cause of removal, which cannot be reached by impeachment, and of course (the executive not being permitted to remove) the right must necessarily devolve on the legislature. Is this the honour-

able member's argument? If it be, the reply is very simple. *Misbehaviour* is not a term known in our law. The idea is expressed by the word *misdemeanor*; which word is in the clause quoted respecting impeachments. Taking therefore the two together, and speaking plain old English, the constitution says: "The judges shall hold their offices so long as they shall *demean* themselves *well*, but if they shall *misdemean*, if they shall on impeachment be convicted of *misdemeanor*, they shall be removed." Thus, sir, the honourable member will find that the one clause is just as broad as the other. He will see, therefore, that the legislature can assume no right from the deficiency of either, and will find that this clause which he relied on goes, if rightly understood, to the confirmation of our doctrine.

Is there a member of this house, who can lay his hand on his heart and say, that, consistently with the plain words of our constitution, we have a right to repeal this law? I believe not. And if we undertake to construe this constitution to our purposes, and say that the public opinion is to be our judge, there is an end to all constitutions. To what will not this dangerous doctrine lead? Should it to-day be the popular wish to destroy the first magistrate, you can destroy him. And should he to-morrow be able to conciliate to him the popular will, and lead them to wish for your destruction, it is easily effected. Adopt this principle, and the whim of the moment will not only be the law, but the constitution of our country.

The gentleman from Virginia has mentioned a great nation brought to the feet of one of her servants. But why is she in that situation? Is it not because popular opinion was called on to decide every thing, until those who wore bayonets decided for all the rest. Our situation is peculiar. At present our national compact can prevent a state from acting hostilely towards the general interest. But let

this compact be destroyed and each state becomes instantaneously vested with absolute sovereignty. Is there no instance of a similar situation to be found in history? Look at the states of Greece. They were once in a condition not unlike to that in which we should then stand. They treated the recommendations of their Amphyctionic council (which was more a meeting of ambassadors than a legislative assembly) as we did the resolutions of the old congress. Are we wise? so were they. Are we valiant? They also were brave. Have we one common language, and are we united under one head? In this also there is a strong resemblance. But by their divisions, they became at first victims of the ambition of Philip, and were at length swallowed up in the Roman empire. Are we to form an exception to the general principles of human nature, and to all the examples of history? And are the maxims of experience to become false, when applied to our fate?

Some, indeed, flatter themselves, that our destiny will be like that of Rome. Such, indeed, it might be, if we had the same wise, but vile, aristocracy under whose guidance they became the masters of the world. But we have not that strong aristocratic arm, which can seize a wretched citizen, scourged almost to death by a remorseless creditor, turn him into the ranks, and bid him, as a soldier, bear our eagle in triumph round the globe. I hope to God we shall never have such an abominable institution. But what, I ask, will be the situation of these states (organised as they now are) if, by the dissolution of our national compact, they be left to themselves? What is the probable result? We shall either be the victims of foreign intrigue, and split into factions, fall under the domination of a foreign power, or else after the misery and torment of civil war, become the subjects of an usurping military despot. What but this compact! What but this specific part of it, can save us from ruin? The judicial power, that fortress of the constitution, is now to

be overturned. Yes, with honest Ajax, I would not only throw a shield before it, I would build around it a wall of brass. But I am too weak to defend the rampart against the host of assailants. I must call to my assistance their good sense, their patriotism, and their virtue. Do not, gentlemen, suffer the rage of passion to drive reason from her seat. If this law be indeed bad, let us join to remedy the defects. Has it been passed in a manner which wounded your pride or roused your resentment? Have, I conjure you, the magnanimity to pardon that offence. I intreat, I implore you, to sacrifice those angry passions to the interests of our country. Pour out this pride of opinion on the altar of patriotism. Let it be an expiatory libation for the weal of America. Do not, for God's sake, do not suffer that pride to plunge us all into the abyss of ruin. Indeed, indeed, it will be but of little, very little avail, whether one opinion or the other be right or wrong; it will heal no wounds, it will pay no debts, it will rebuild no ravaged towns. Do not rely on that popular will which has brought us frail beings into political existence? That opinion is but a changeable thing. It will soon change. This very measure will change it. You will be deceived. Do not, I beseech you, in reliance on a foundation so frail, commit the dignity, the harmony, the existence of our nation to the wild wind. Trust not your treasure to the waves. Throw not your compass and your charts into the ocean. Do not believe that its billows will waft you into port. Indeed, indeed, you will be deceived. Oh! cast not away this only anchor of our safety. I have seen its progress. I know the difficulties through which it was obtained. I stand in the presence of Almighty God, and of the world. I declare to you, that if you lose this character, never! no never! will you get another. We are now, perhaps, arrived at the parting point. Here, even here, we stand on the brink of fate. Pause—pause—for heaven's sake pause.

SPEECH OF MR. RUTLEDGE

ON THE JUDICIARY ESTABLISHMENT.

I HAVE kept my seat, Mr. Chairman, until this late stage of the debate, under a hope that the arguments of gentlemen who advocate the passing of this bill, would convince me it is not unconstitutional; but after having listened most attentively to them for many days, I find the deep impression made upon my mind, that it attacks the very vitals of our constitution, has been fortified and extended instead of being dismissed.

It is not necessary, sir, for me to call to your recollection what was the situation of America anterior to the formation of the present government. Our state governments had proved to be mere ropes of sand. Experience had shown the confederation to be miserably defective in all its parts. Those evil times, when anarchy and jealousy distracted our state governments, and clashing interests threatened to break our federal union, called all America upon its legs. The people of this nation summoned their wisest and best men to meet in convention, to form a constitution which should promote the lasting welfare of our country, and secure the liberties their valour and wisdom had won.

The difficulty of the task was fully equal to its importance. In reviewing the histories of other republics, the convention saw that like the splendid shows of a magic lantern, they had appeared and disappeared in almost the same moment of time; as had been observed by a celebrated writer, they rose like a rocket, and fell like the stick. Although their existence had every where been

transient, yet it had been protracted wherever the institutions of the country had excited any kind of veneration for its judicature. At Athens in particular, and indeed throughout Greece, the liberties of the people were for a season preserved by the respect felt towards the august court of Areopagus. Notwithstanding the aspiring ambition of some of the states, the intrigues of powerful demagogues, and the general degeneracy of manners, yet as long as this venerable judicature was respected, Greece continued free. As soon as it lost its influence, the people lost their liberties. Taught by these examples the value of a good judiciary, the patriots who met at Philadelphia, determined to establish one which should be independent of the executive and legislature, and possess the power of deciding rightfully and finally on conflicting claims between them. The convention laid their hand on this invaluable and protecting principle; in it they discovered what was essential to the security and duration of free states; what would prove the shield and palladium of our liberties; and they boldly said, notwithstanding the discouragement in other countries, and in times past, to efforts in favour of republicanism, our experiment shall not miscarry, for we will establish an independent judiciary; we will create an asylum to secure the government, and protect the people, in all the revolutions of opinion, and struggles of ambition and faction. They did establish an independent judiciary. There is nothing, I think, more demonstrable than that the convention meant the judiciary to be a co-ordinate and not a subordinate branch of the government. This is my settled opinion; but on a subject so momentous as this is, I am unwilling to be directed by the feeble lights of my own understanding; and as my judgment, at all times very fallible, is liable to err much where my anxieties are much excited, I have had recourse to other sources for the true meaning

of this constitution. During the throes and spasms, as they have been termed, which convulsed this nation, prior to the late Presidential election, strong doubts were very strongly expressed, whether the gentleman, who now administers this government, was attached to it *as it is*. Shortly after his election, the legislature of Rhode Island presented a congratulatory address, which our chief magistrate considered as soliciting some declaration of his opinions of the federal constitution; and in his answer deeming it fit to give them, he said, “ the constitution *shall* be administered by me, according to the safe and *honest* meaning contemplated by the *plain understanding of the people at the time of its adoption*; a meaning to be found in the explanations of those who advocated, not those who opposed it. These explanations are preserved in the *publications of the time*.” To this high authority I appeal. To the honest meaning of the instrument; the plain understanding of its framers. I, like Mr. Jefferson, appeal to the opinions of those who were the friends of the constitution at the time it was submitted to the states. Three of our most distinguished statesmen, who had much agency in framing this constitution, finding that objections had been raised against its adoption, and that much of the hostility produced against it had resulted from a misunderstanding of some of its provisions, united in the patriotic work of explaining the true meaning of its framers. They published a series of papers, under the signature of Publius, which were afterwards republished in a book called the Federalist. This cotemporaneous exposition is what Mr. Jefferson must have adverted to, when he speaks of the publications of the time. From this very valuable work, for which we are indebted to Messrs. Hamilton, Madison and King, I will take the liberty of reading some extracts, to which I solicit the attention of the committee. In the seventy-

eighth number we read “ *good behaviour* for the continuance in office of the judicial magistracy, is the most valuable of the modern improvements in the practice of government. In a republic, it is a barrier to the encroachments and oppressions of the representative body. And it is the best expedient that can be devised in any government, to secure a steady, upright, and impartial administration of the laws. The *judiciary*, in a government where the departments of power are separate from each other, from the nature of its functions, will always be the least dangerous to the political rights of the constitution. It has no influence over the sword or the purse, and may truly be said to have neither *force* nor *will*, but merely judgment. The *complete* independence of the courts of justice is essential in a limited constitution, one containing specified exceptions to the legislative authority; such as that it shall pass no ex post facto law, no bill of attainder, &c. &c. Such limitations can be preserved in practice no other way than through the courts of justice, whose duty it must be to declare all acts manifestly contrary to the constitution, *void*. Without this, all the reservations of particular rights or privileges, of the states or the people, *would amount to nothing*. Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the courts designed to be an intermediate body between the people and the legislature, are to keep the latter within the limits assigned to their authority. The convention acted wisely in establishing *good behaviour* as the tenure of judicial offices. Their plan would have been inexcusably defective had it wanted this important feature of good government.” The authority I have read, proves to demonstration what was the intention of the convention on this subject; that it was to establish a judiciary completely independent of the executive and legislature, and

to have judges removable only by impeachment. This was not only the intention of the general convention, but of the state conventions when they adopted this constitution. Nay, sir, had they not considered the judicial power to be co-ordinate with the other two great departments of government, they never would have adopted the constitution. I feel myself justified in making this declaration, by the debates in the different state conventions. From those of the Virginia convention, I will read some extracts, to show what were the opinions of the speakers there of both political parties. The friends of the constitution insisted that our federal judges would be independent of every thing but their behaviour, and their God. —The opposers of the constitution insisted, that they would not be *perfectly* independent of the legislature, because they might increase their salaries. Affectionately attached to the sovereign rights of the states and the people, the opposers of the constitution displayed all the suspicion of jealous lovers. They supposed the judges would not be *completely independent*, and insisted if they were not, there would soon be a concentration of all power in the legislature, and a perfect despotism in our country. Hence it appears that both parties thought the judges ought to be beyond the reach of the legislature, except by impeachment. The friends of the constitution insisted they were so; the opposers feared they were not. Let us attend to the debates in the convention of Virginia—

General Marshall, the present chief justice, says, ‘ can the government of the United States go beyond those delegated powers? If they were to make a law, not warranted by any of the powers enumerated, it would be considered as an infringement of the constitution *which they are to guard*: they would not consider such a law as coming under their jurisdiction: *they would declare it void.*’ Mr. Grayson, who opposed the constitution, we

find saying, 'the judges will not be independent, because their salaries *may be augmented*.' This is left open. What if you give 600*l.* or 1000*l.* annually to a judge? 'Tis but a trifling object, when by that little money you purchase the most invaluable blessing that any country can enjoy. The judges are to defend the constitution.' Mr. Madison, in answer, says, 'I wished to insert a restraint on the augmentation, as well as diminution of the compensation of the judges—but I was over-ruled; the business of the courts must increase. If there was no power to increase their pay, according to the increase of business, *during the life of the judges*, it might happen that there would be such an accumulation of business, as would reduce the pay to a most trivial consideration.' Here we find Mr. Madison not using the words good behaviour; but he says (what we say was meant by good behaviour) *during the life of the judges*. The opinions of Mr. Madison I deem conclusive, as to the meaning of the words good behaviour; but I will read what was said by Mr. Nicholas, which is substantially the same. [Here Mr. Rutledge read several extracts from the debates in the Virginia convention.] These quotations show that, in Virginia at least, the public wish and intention was to have an independent judiciary. Let us now see what was the opinion on this subject of the first congress under the constitution, when the first judiciary bill was debated. Mr. Stone says, 'the establishment of the courts is *immutable*.' Mr. Madison says, 'the judges are to be removed only on impeachment, and conviction before congress.' Mr. Gerry, who had been a member of the general convention, expresses himself in this strong and unequivocal manner: 'The judges will be independent, and no power can remove them; they will be beyond the reach of the other powers of the government; they will be unassailable, and cannot be affected but by the united

voice of America, and that only by a change of government.' Here it is evident Mr. Gerry supposed a project like the present could only be effected by the people, through the medium of a convention—he did not suppose it possible for congress ever to grasp at this power. The same opinions were held by Mr. Lawrence and Mr. Smith. [Here Mr. Rutledge read further extracts from the congressional debates.] In addition to those high authorities, permit me, Mr. Chairman, to read some parts of the lectures, on the judiciary of the United States, of the celebrated judge Tucker, the present professor of law at the university of William and Mary, in Virginia. [Here Mr. Rutledge read from Tucker's lectures.] I wish gentlemen who compare the official tenure of our judges with those of Great Britain, to attend to the wide distinction between their independency, as shown by the learned judge and professor, whose lectures I have cited—he shows, that the judges in England have only a *legal* independence, while in America they enjoy a constitutional independence.

The advocates of this bill say, the people could not have meant to establish an independent judiciary, because a permanent body of men, beyond all control, would prove hostile to the liberties of the people. Sir, we do not contend for any such establishment—we do not wish for a judiciary permanent and beyond control—No, sir, all we insist upon is, that the judges are liable to that sort of control only which the constitution establishes, that *good behaviour* is the tenure by which they hold their office, and that they cannot be removed from it but by impeachment. That the judicial authority was never designed to depend upon the executive and legislative powers, but in some sort to balance them. That our federal judicature was meant to give to the government a security to its justice against its power—it was con-

trived to be, as it were, something exterior to the state. The honourable gentleman from Vermont (judge Smith) who preceded me, says, our construction of the constitution is derived from implication. This is not the case, sir, we require no ingenuity, no sophistry, no metaphysical distinctions to bear us out in our construction. We resort to the plain meaning of the words of the constitution. Knowing the constitution would contain the seeds of its dissolution, should it contain articles liable to ambiguity, the convention cautiously avoided obscurities. They selected as plain words as any in our language, to represent their intention of having an independent judiciary—they used words that are intelligible to almost every capacity. Let us read them: ‘The judges, both of the supreme and inferior courts, shall hold their office during good behaviour.’ These are the words of the constitution, and what words, sir, could have been found more express, more unequivocal in their meaning? Let us suppose, Mr. Chairman, that instead of being the legislature, and instead of having the constitution before us upon trial, and (as is the case I fear) being about to sign its death warrant, we were a convention called by the people to form a constitution; that we had determined to establish an independent judiciary; to have judges removable only by impeachment; that having decided this principle, it was referred to a committee to draft a clause conformably to the idea of having the judicial entirely independent of executive and legislative power, and that this service was assigned to the honourable gentleman from Virginia, (Mr. Giles) could his ingenuity, could his knowledge of our language, furnish words to represent the intention of having an independent judiciary, more appropriate, more unequivocal, more familiar, than the words used by the convention, and which I have just read? They are explicit, simple, unqualified, and at

the same time imperative. The understanding of the convention, of the states, and of the people at large was, that our judiciary should be independent. They deemed this constitutional check essential to the duration of the government; and until the fourth day of last March, I believe the judiciary was considered as sacred. The state governments, and the people, and the friends of our federal union, revered it as the fortress and ark of their safety.

While this shield remains to the states, it will be difficult to dissolve the ties which knit and bind them together. As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The government may be administered with indiscretion, and with violence—offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections—the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions—but so long as we have an independent judiciary, the great interests of the people will be safe. Neither the president, nor the legislature can violate their constitutional rights. Any such attempt would be checked by the judges, who are designed by the constitution to keep the different branches of the government within the spheres of their respective orbits, and say, thus far shall you legislate and no further. Leave to the people an independent judiciary, and they will prove that man is capable of governing himself—they will be saved from what has been the fate of all other republics, and they will disprove the position, that governments of a republican form cannot endure. I did hope, from the promises made by the honourable gentleman from Virginia, (Mr. Giles) on a former occasion, when we attempted to postpone this bill, that he would have given it an unimpassioned consideration—if it were

possible for him to dismiss party feelings, and argue any question upon its real merits, it was to be hoped he would have given a cool and deliberate consideration to this all important subject, and argued it upon the ground of unconstitutionality. But unmindful of his promise not to consider this as a party question, the gentleman prefaced his observations with saying he designed to make them personal.

His preliminary remarks were highly afflictive to myself and friends—we deprecated this course, but the gentleman's crimination must be deemed a justification of the recrimination which he has rendered necessary. This is a painful task, and if gentlemen should feel themselves, or their friends wounded by any of our observations, they must recollect the situation in which they have placed us, and that the necessity of defending ourselves has been imposed upon us by their attacks. In a speech which occupied two hours, ten minutes only of that time were given to a consideration of the constitutionality of this measure, and then the gentleman found it convenient to employ the rest of it in fulminating his anathemas against the past administrations, and reiterating those invectives and censures, which on all past occasions he has indulged himself in bestowing upon those who are no longer in power. Whether attacks are to be continued upon the past administrations, to divert the public eye from the present administration, or whether they are calculated to raise a smoke, under the cover of which gentlemen may march unobserved to attack the vitals of our constitution, is best known to themselves. The gentleman from Virginia has rendered homage to the judiciary of Great Britain—acknowledges much of the prosperity of that nation to be produced by the independency of their judges—says our's are at least as independent, but that the doctrine of making them *completely* independent

is a monstrous one. Sir, there is no kind of analogy between the governments of America and Great Britain, and none between the situation of the judges in that and in this country. The people of England gained much, and had an abundant source of oppression dried up, when they got their judges made independent of the monarch, whose creatures they had been, and whose arbitrary measures they had been obliged to support. But, sir, it was impossible to make the judges a check upon parliament, for nothing in that government is independent of the parliament. In this country things are far different; we have a written constitution—the people have given certain powers to the executive, other defined powers to congress, and delegated other powers to the judiciary. But the gentleman from Virginia wishes to make congress as powerful as the parliament of Great Britain—he wants the legislature in America to be (like the parliament in England) *without control*: he wants to destroy that check, which the people in their constitution formed for us—he wants to prostrate that protecting principle, which was never before known in a republican government, and for the want of which all republics have perished. In England, the independence of the judiciary, as far as it goes, I highly appreciate, but I venerate the independence of our judges, (as designed by the people when they adopted the constitution) because it is complete—in England it is not. There they have a legal independence; here a constitutional one. Although the independence of the judges in England is partial, yet it has been productive of vast good; although they may be said to be in some measure still dependent on the monarch, in as much as pensions and places are in his gift, yet it is well known, the independence they do possess of the crown, prevents reasons of state from entering the courts, and that the royal will sinks into nothing and disappears at the seat of

justice, when opposed by the law. From many proofs of this fact, I beg leave to select the case of Mr. Wilkes, at the time of his second election, and when he had been outlawed; although the whole power of the crown was most actively employed to crush this obnoxious subject, yet lord Mansfield, and the whole bench of judges, declared the outlawry contrary to the principles of common law, and reversed it, as being illegal. Permit me to read this case—(here Mr. R. read an account of the proceedings, and the whole of lord Mansfield's celebrated speech.) The judiciary, on this occasion, we see checking arbitrary executive measures, because they were independent of the executive.

In America, the judicial power was designed as a constitutional check upon both the executive and legislature—but gentlemen on the other side, deprecating all control, are for prostrating the check imposed by the people on their representatives, and the destruction of which will make them omnipotent. The gentleman from Virginia says the judicial power was not formed by the constitution. I shall not be surprised by any declaration he may make about the meaning of the constitution after this. Sir, the judicial power is established by the constitution, equally with the executive and legislature. The organization of the courts had been left to congress; but the instrument under which we act has established the judiciary, and has also assigned its duties. A charge has been made against us by the honourable gentleman, which I must deny, I plead not guilty to it, and say he is wholly mistaken. He has charged us with having changed with the times, and with having formerly advocated the extension of the powers of this house. Sir, this is not the case, *tempora mutantur, sed non mutamur in illis*. Knowing how strongly disposed, in governments like our's, the popular branch always is, to grasp at illegitimate powers,

we have in times past struggled hard for preserving to all the branches of the government, the powers delegated to them respectively by the constitution; we have ever been watchful of executive and judicial rights, and defended them from the encroachments attempted by the legislature. The gentleman from Virginia must permit me to call to his memory the course of conduct we pursued on a very memorable occasion, when he and his friends wished this house to arrogate executive powers. I refer to the proceedings on a motion made by an honourable gentleman, then his colleague, who is not now a member of this house, (Mr. Nicholas) in the debate on the foreign intercourse bill. Mr. Nicholas said, "I believe all governments like our's, tend to produce a union and consolidation of all its parts in the executive department, and the limitations of each other will be destroyed by executive influence, unless there is a constant operation on the part of the legislature to resist this overwhelming power. A representative government may be made the most oppressive, and yet preserve all its constitutional forms, and the legislature shall appear to act upon its own discretion, whilst that discretion shall have ceased. Where under our government the executive has an influence over the legislature, the executive is capable of carrying its views into effect, in a manner superior to what can be done in a despotic monarchy. Mischiefs will be carried further, because the people will be inclined to submit to a government of its own choosing. Monarchs cannot carry their oppression so far without resistance as republics. Suppose executive patronage had extended its influence into the legislature, and that in consequence of a thirst for office, majorities were formed in both branches of the legislature, devoted to the views of the executive; where would be a check to objects hostile to the public good? In what branch of the government

would you look for it? Was it the senate? Will you look to this house? *The majorities are humble expectants of office.* Where then will you find any thing capable of controlling the overbearing influence of the executive? It must be in *small and feeble minorities*, who by their opposition, and attention to the interests of the people, against arbitrary power, may rouse the people to a sense of their danger, and force the public sentiment to be respected; this he conceived would be the only check." It hence appears, that those gentlemen have availed themselves of every occasion to extend the powers of congress, and had their attempts been successful, we should, ere this, have had a consolidated government—a kind of government which the people of this country never wished to establish, and which is incompatible with their best rights. The gentleman from Virginia, whose argument I have quoted on the subject of the foreign intercourse bill, shows that those who were then in the minority, extended their project so far as to count upon *the minority* to check the powers of the other departments of government. Not so, sir, is the case with us; we do not count upon the efforts of feeble minorities—we do not wish to guard the constitution by appeals to the people, we will do nothing calculated to produce insurrection, we do not want to protect the great charter of our rights by the bayonet. No, sir, we rely on honest and legitimate means of defence; we wish to check these gentlemen only with constitutional checks. The people of America say, in their constitution, the judiciary is designed as a check upon the legislature and executive, and as a barrier between the people and the government. We say it is the sheet anchor, which will enable us to ride out the tornado and the tempest, and that if we part from it there is no safety left; that it is the only thing which can preserve us from the perilous lee shore, the rocks

and the quicksands where all other republics have perished. The judiciary is the ballast of the national ship—throw it overboard and she must upset.

[Mr. Giles begged leave to explain; he said the gentleman had not quoted his arguments fairly; he never held the ideas ascribed to him; he certainly had not said the gentleman from South Carolina wished on former occasions to confide power to the popular branch of the government; the gentleman from South Carolina, he believed, never wished this, or any other popular branch of government, trusted with power.]

Mr. Rutledge said, on a subject so momentous as this he would not trust to his memory; that he had taken down the words of the gentleman from Virginia; he certainly did not mean to misrepresent him, and was sorry he had supposed he had not quoted him fairly. It has been further said by this gentleman, that as the judiciary was established for the benefit of the people, and is maintained by their money, the people must wish it put down when the *proper authority* tells us it has no duties to perform and is a mere sinecure. I should be glad to know, sir, what is meant by the *proper authority*; are we to judge in this business, or is the executive to judge for us? Sir, the executive has seen fit to judge for us, but I believe he has gone beyond the line of his duty; and it would be more proper to call this document, now in my hand, an officious than an official act. However unpleasant it may be to gentlemen to call this an executive measure, the great solicitude discovered by the president to get dis-embarrassed of this most salutary constitutional check, proves it his measure; it is not the measure of congress, nor of the people, but of the executive. Not satisfied with calling the attention of congress to this subject, he has, in his zeal to furnish arguments to those who support here his measures, given us a table, showing what business

had been done in the federal courts prior to the late organization of them. Had the former president furnished the late congress with such a document as this, it would have been considered as abundant evidence of the inconvenient organization of the federal courts, and furnished arguments for the change in the system which we did make; the result of this document is, that owing to the inconvenient arrangement of the system, suitors were deterred from entering the national courts. It shows how insufficient the provision for doing business was, under the ancient system, and not how little there is to do. In a nation so great, and so growing in greatness as our's is; among a people so commercial, so enterprising, and so attached to right, as are the people of this country, there must be much law or there will be no justice. But had the late executive furnished, unsolicited by congress, such a document, the whole nation would have rung with censures. He would have been charged with considering congress as a mere bureau—a committee or commune through which the executive was to make his projects and his propensities felt. In this document, No. 8, we see the arm of the executive raised against the judiciary, and in his message we hear him say *it must fall*. If he had contented himself with merely directing our attention to the law he wishes repealed, we might have obtained much more useful information for ourselves than what he has been pleased to give. If he had only adverted to this subject, as one requiring the consideration of congress, and they had wished for information, they would have called upon the proper officer for it, and have directed the attorney general to furnish a table, showing what business had been done in the circuit courts *since the time of their establishment*. Such a document would have shown whether the existing law be beneficial or not; but the president, it seems, did not deem it wise to leave to us the

usual course of obtaining information; perhaps he had sufficient reasons for this; probably such a document as I have mentioned, would have given a result not suited to executive views. It would have shown that *much important business* had been done in the circuit courts, although they have had but a short existence. Whether the executive was incited to act with the promptitude he did, to prevent its being known of what vast utility the law is, it is not for me to say. I must be permitted, however, Mr. Chairman, to say, that having passed the last summer in the eastern states, I know, that in that section of the union, the circuit court was fully occupied during its session. It is within my own knowledge, that at Portsmouth, in New Hampshire, there was much business done; at Boston there was a great deal of important business despatched much to the satisfaction of suitors, and I learned from an authentic source, that the court was a highly popular one. At Newport in Rhode Island, there was so much business, that the court was under the necessity of holding evening sessions. In Vermont I know that much business was done, and done much to the satisfaction of the public. From the gentlemen of the bar in New-Jersey, we have a memorial, stating that there had been many causes tried in the circuit court in that state. In Philadelphia the gentlemen of the bar, of both political parties, have united in informing us, that they deem the continuance of this court not only useful but necessary. From the chamber of commerce at New York, and from the merchants in Philadelphia, we have received petitions, praying for a continuance of the law, which has been denounced, and which the executive thinks unnecessary. These facts make a mass of high evidence, which on ordinary occasions would weigh much. But I fear it will not preserve the law in question.

It has been frowned upon from high authority, and I fear it must perish.

Sir, this document, No. 8, is as little calculated to serve the purposes of gentlemen who appeal to it, as is the document produced some days past by a gentleman from Virginia (Mr. Thompson.) He gave us a record from the court of chancery in Virginia, to show how much business there is done in that court, where he says there is but one judge, and his salary is only 1500 dollars. The honourable gentleman says, in Virginia they have but one chancellor, with the salary of 1500 dollars, who renders as much service as all the national courts; and to prove this he reads to us a certificate from the clerk of the court of chancery, stating that on the chancery docket there were *two thousand six hundred and twenty seven* causes. This paper serves to show not what business is done, but what a mass of business there is undone, and which the court is incompetent to dismiss. What a frightful picture has he given of the judicature of his own state. How alarming must it be to foreigners, and the citizens of other states, who may have causes depending in Virginia. What chance can a citizen of South Carolina, Massachusetts, or elsewhere, have of obtaining justice before the lapse of many years, if the history given by the gentleman of Virginia be correct. Should a citizen of another state be a suitor in Virginia, it is competent to the citizen of that state to carry the cause into the court of chancery, where a mass of business presents itself to his view, and he finds 2600 causes must be dismissed before his can be heard. Where would the citizens of other states, having debts in Virginia, attempt their recovery? They would seek justice, sir, in the federal circuit court, which gentlemen are now endeavouring to annihilate, and not in the state court, which may be more properly called a bed of justice than a court of justice, if

justice sleeps there as the gentleman has represented. He also states, that state justice is cheaper than national justice. I do not believe this a correct position. I am very willing to enter into a comparison, but must exclude from it Virginia, because he has shown that justice is denied there, it being greatly delayed.

Thursday, February 25, 1802.

In the course of the observations I yesterday offered, I endeavoured to show that it was the intention of the convention to make our judges independent of both executive and legislative power—that this was the acknowledged understanding of all the political writers of that time, the belief of the state conventions, and of the first congress when they organized our judicial system. If I have been successful in my attempt to establish this position, and if (what I suppose cannot be denied) it be true in jurisprudence, that whenever power is given specially to any branch of government, and the tenure by which it is to be exercised be specially defined, that no other, by virtue of general powers, can rightfully intrude into the trust—then, I presume, it must follow of consequence that the present intermeddling of congress with the judicial department, is a *downright usurpation*, and that its effect will be the concentration of all power in one body, which is the true definition of *despotism*. As, sir, every thing depends upon the fair construction which this article in the constitution, respecting the judiciary, is susceptible of, I must again read it. [Here Mr. R. read several clauses of the constitution.] Some of the clauses we see are directory, and others prohibitory. Now, sir, I beg to be informed of what avail are your prohibitory clauses, if there be no power to check congress, and the president, from doing *what the constitution has prohibited* them from doing? Those prohibitory re-

gulations were designed for the safety of the state governments, and the liberties of the people. But establish what is this day the ministerial doctrine, and your prohibitory clauses are no longer barriers against the ambition or the will of the national government; it becomes supreme, and is without control. In looking over these prohibitory clauses as the representative of South Carolina, my eye turns with no inconsiderable degree of jealousy and anxiety to the 9th section of the 1st article—which declares, [Here Mr. R. read the article respecting migration before the year 1808.]

I know this clause was meant to refer to the importation of Africans only, but there are gentlemen who insist that it has a general reference, and was designed to prohibit our *inhibiting migration*, as well from Europe as any where else. It is in the recollection of many gentlemen, who now hear me, that in discussing the alien bill, this clause in the constitution was shown to us, and we were told it was a bar to the measure; and an honourable gentleman from Georgia, then a member of this house, and now a senator of the United States (and who had been a member of the convention) told us very gravely, he never considered this prohibition as relating to the importation of slaves. I call upon gentlemen from the southern states to look well to this business. If they persevere in frittering away the honest meaning of the constitution by their forced implications, this clause is not worth a rush—is a mere dead letter; and yet, without having it in the constitution, I know the members from South Carolina would never have signed this instrument, nor would the convention of that state have adopted it. My friend, from Delaware, standing on this vantage ground, says to our opponents, here I throw the gauntlet, and demand of you how you will extricate yourselves from the dilemma in which you will be placed, should congress

pass any such acts as are prohibited by the constitution. The judges are sworn to obey the constitution, which limits the powers of congress, and says they shall not pass a bill of attainder, or *ex post facto* law, or tax articles exported from any state: and it has other prohibitory regulations. Well, sir, suppose congress should pass an *ex post facto* law, or legislate upon any other subject which is prohibited to them, where are the people of this country to seek redress? Who are to decide between the constitution and the acts of congress? Who are to pronounce on the laws? Who will declare whether they be unconstitutional? Gentlemen have not answered this pertinent inquiry. Sir, they cannot answer it satisfactorily to the people of this country.—It is a source of much gratification to me to know, that my sentiments on this subject, as they relate to the constitutionality of it, are in unison with those of the wisest and best men in my native state. The judicial system had proved so inconvenient there, as to render a new organization of it necessary some years past. There were gentlemen in the legislature as anxious to send from the bench some of the judges, as gentlemen here are to dismiss our federal judges; personal animosities existed there as well as here, though not to so great an extent; but it was the opinion of a large majority of the South Carolina legislature, that as the constitution declares “the judges shall hold their offices during good behaviour,” the office could not be taken from them, the measure was abandoned, and the wise and cautious course pursued, which we wish gentlemen here to follow; the system was not *abolished*, but *modified* and extended; the judges had new duties assigned to them, and their number was increased, but no judge was deprived of his office. In South Carolina they have a court of chancery, consisting of three chancellors, and the law establishing it requires the presence of two judges

to hold a court. During a recess of the legislature one of the chancellors resigned, and another died. The functions of this court of consequence became suspended. All the business pending in it was put to sleep. The public prints were immediately filled with projects for destroying the court which had been denounced as unnecessary. As the citizens of the western part of the state had not participated much in the benefits derived from the court of chancery, many of the most influential of them deemed it of little utility. The opposition assumed so formidable an aspect, as to determine the governor (who exercises the power of appointing judges during the recess of the legislature) not to make any appointment, believing the court would be abolished. When the legislature met, an effort was made to abolish the court; but a large majority, giving to the constitution the honest meaning of its framers, considered the judges as having a life estate in their offices, provided they behaved well; and the vacancies on the chancery bench were immediately supplied.

That the national judicial establishment is comparatively more costly than are the state judiciaries, is far from being the case, I believe. It may be so in Virginia, where they have but one chancellor with little salary and much business; but it is not so in other states. In South Carolina we have six judges at common law, at six hundred pounds sterling a year each; three chancellors at five hundred pounds each, which, together with the salaries and fees of office of the attorney general, master in chancery, solicitors, clerks and sheriffs, amount to *six thousand two hundred pounds sterling*. And yet, sir, justice I believe is no where cheaper than in South Carolina. By the judicious structure of her judiciary system, the streams of justice are diffused over the whole state, and every man is completely protected in his life, liberty, property and reputation. The courts are almost constantly in session.

The judges are gentlemen of high talents, integrity and strict impartiality; and every one who goes into the court of that state, not only obtains ample justice, but obtains it promptly—this, sir, is what I call cheap justice. The gentleman from Virginia has seen fit to notice the law which laid a direct tax, and said it was imposed when we knew the administration of this government was soon to pass from those then in power; and was resorted to as a means of extending executive patronage, and to make provision for the friends of an expiring executive. Can the honourable gentleman be serious in all this? Does he remember when we passed this law? It was in 1798, when, I will be bold to say, the administration enjoyed the highest degree of popular favour. In no popular government, perhaps, was an administration more popular than was the former administration at the time this tax was laid. Sir, this law had no connexion with personal or party considerations—Like all the measures of the past administration, it was designed to promote the public good. Had we, like our opponents, consulted the caprices and prejudices, and not the real interests of our constituents; had we been merely attentive to popular favour, we should not have passed this law: at the crisis it was passed the public good demanded it, and we were regardless of every other consideration. A nation that had lighted up the flame of war in every corner of Europe, that was prostrating the liberties of every free people, and endeavouring to subvert the government of every country, saw fit to menace us;—told us, that for the preservation of our peace and independence we must pay tribute. This degrading measure was scornfully rejected by the former administration—They said if we must fall, we will fall after a struggle; and our citizens prepared themselves for war with alacrity, and regarded every sacrifice as inconsiderable compared with the great sacrifice of independence.

With this prospect of immediate war, we should have acted not only unwisely but treacherously, had we trusted for public income to the revenue derived from trade; had our trade been destroyed, there would have been a complete destitution of revenue, and to place the means of national defence, as far beyond the reach of contingency as possible, we imposed the direct tax. We knew this law would prove arms and ammunition to those who were inventing all the falsehood credulity could swallow, and who were busily employed in misrepresenting and calumniating the conduct of the government. We did suppose they might make this law their artillery to batter down the administration—but we were not deterred from our honest purposes by this expectation; a change of men when compared with a change of government, weighed with our minds as dust in the balance; our measures did not aim at popularity, and we were just to our country, regardless of any party consequences. At this early period, says the gentleman, it was to have been calculated what would be the result of the presidential election. Sir, those must have been gifted with second sight, they must have been prophets indeed, who could have then foretold how the election would issue; the result was as doubtful as any event could be, until within a few days of the election. It is recollected that every thing depended upon the South Carolina vote; all the gentlemen in nomination went there with an equal number of votes; the anxiety displayed at the time by the gentlemen here from Virginia, proved they then deemed it very doubtful how the election would terminate. Indeed, sir, nothing could have been more doubtful, and I believe it is fully known to the ministerial side of this house, that it depended upon one of the gentlemen nominated, who had not the Carolina votes, to have obtained them, and produced to the election a different result—but his correct mind was ob-

noxious to any intrigue; it would not descend to any compromise, and this honourable man knew that no station could be honourable to him unless honourably obtained. In the very wide range, which the gentleman from Virginia has permitted himself to take, he has been pleased to notice the conduct of the late congress when they were occupied in the election of a president of the United States, and he has said we were then "pushing forward to immolate the constitution of our country." What does all this mean, sir? What, sir! Because we, of the two gentlemen who had from the electors an equal number of votes, did not prefer him *who was from Virginia*, are we to be charged with an immolation of our constitution? Sir, the gentleman from Virginia was not a member of the last congress, and lest he should not know the history of the transaction, to which he alludes, I will give it.

The electors chosen in the different states gave the same number of votes for Thomas Jefferson and Aaron Burr; there being a tie, it devolved, by the direction of the constitution, upon the house of representatives to make an election. We sincerely believed that Mr. Burr was the best and the most fit man to be president, and we accordingly voted for him; we continued to vote for him six and thirty times; we were anxious to have him elected, and we deprecated the election of the other candidate; but when we found gentlemen were determined not to have the candidate from New-York, and said they would have a president from Virginia, or they would have no president at all; we, who venerated our constitution too sacredly to do any thing which should hazard the loss of it, yielded. We believed Mr. Jefferson radically, and on principle, hostile to the national constitution—we believed some of the most important features in it obnoxious to him—we believed him desirous of destroying the inde-

pendence of our judiciary—we believed him opposed to the senate, as now organized; and we believed him destitute of that degree of energy, necessary to maintain the general liberty of the people of the United States. With these impressions deep upon our minds, we should have been traitors to our country had we voted for the gentleman from Virginia, as long as there was any prospect left to us of elevating the gentleman from New-York; but when we found the object of our preference was so obnoxious to gentlemen on the other side, that they would hazard the having of no president, rather than have him, we ceased our opposition. And this is what the honourable gentleman from Virginia has been pleased to call ‘pushing forward to immolate the constitution.’ I regret, Mr. Chairman, being compelled to mention names, and say any thing of a personal nature, but I am obliged to do it in pursuing the gentleman from Virginia, who in his extraordinary course, has not only mentioned the names of gentlemen, but ascribed unworthy motives for their conduct. He has said Mr. Read and Mr. Greene voted for the law under which they got appointments. Although I have abundant proof that neither of these gentlemen solicited their offices, that they were given spontaneously, and without being expected, yet I will merely answer this observation, by mentioning what is generally known to all gentlemen, who have been of late in the councils of the nation—it is, that it was the invariable practice of the former executive, to appoint gentlemen to office without previously advising with them. It is well known, that under the law, gentlemen are now endeavouring to repeal, Mr. Jay was appointed chief justice, and about the same time, several gentlemen in this house were appointed to some of the most honourable stations under our government—the executive’s intention, it is well known, had not been previously notified to them—it

is known they all declined accepting the places proffered to them. Permit me, sir, to give a brief history of the case of Mr. Greene, on which the gentleman from Virginia has dwelt so much.

The district judge in Rhode Island was appointed circuit judge, and Mr. Greene was appointed district judge. On the fourth day of March, Mr. Greene took his seat in the senate; the friends of the administration objected to his keeping it; they said he was a judge, as appeared by the journals of the senate—they here made a complete recognition of his appointment as judge, and he vacated his seat; after getting home he received his commission, in which the blanks had been filled with the words *circuit judge*, instead of district judge. Mr. Greene enclosed his commission to the executive, in a letter most profoundly respectful, and requested the errors of the clerk, in the department of state, might be corrected, and his commission made to conform to the appointment, as recorded on the senatorial journal. To this letter, which was in highly respectful terms, the president would not deign to have any answer given; he pocketed Mr. Greene's commission and placed another gentleman in his office—this is a history of the appointment of Mr. Greene, of the mistake made by the clerk who filled up his commission, and of the manner in which the president "corrected the procedure." To my friend from New-York, (Mr. Morris) who some days past adverted to the president's system of persecution, the honourable gentleman from Virginia says he is so ignorant of the existence of any such system, that he cannot conceive what is alluded to; and my friend from North Carolina (Mr. Henderson) who spoke of the destructive spirit which had mounted in the whirlwind, and now directs the storm against one half of the community, he charges with having winged his flight into the regions of fancy; and tells us the spirit he sees is a *mere spirit*,

thin as air, and without real form or substance. Sir, my honourable friend from North Carolina is under no magical delusion; the spirit he noticed is a gigantic spirit, and with a giant's size unites a giant's appetite; it attacks the independence of mind, and violates the right of opinion; it establishes a mental tyranny, tampers with integrity, and poisons morals; it has arranged one half of the community against the other; it denounces as a "*sect*" in our country, all those whom the illustrious Washington took to his confidence, and invested with his favour. It establishes boards of inquisition, to know how men, who are in office, voted at the last election, and if they did not then subserve the views of the ruling party, they are stripped of their offices. Many of the proscribed are veterans of seventy-six; they wasted their youth and their substance in fighting our revolutionary battles, and as a small reward for great services, they had offices given to them by the distinguished Washington. Most of those who had been appointed by him, this destroying spirit has turned adrift, and to those who are not yet destroyed it gives (in the New-Haven reply) the promise of Polyphemus to Ulysses, and says, "you shall be devoured last." This is the spirit, sir, against which my friend from North Carolina has raised his voice, and if the honourable gentleman from Virginia will appeal to the wives and children of ninety or a hundred meritorious men, who have been hurled from office, to make way for those who are willing without examination, to yield a blind support to ministerial measures; to sing hosannas to the president, and bend to his will as the osier does to the breeze; I say, sir, if he will appeal to the wives and children of those gentlemen, who have been degraded, disgraced, and reduced to want, as far as it was in the power of the executive to degrade and reduce them, they will tell him this is a spirit of substance, and not thin as air. Fatigued by

its labours we now see this great spirit resting on its club; it no longer dispatches its victims as heretofore, by batches; but, as strength and appetite return, proscriptions are continued, though in detail. Since the meeting of congress there have been many dismissals; in the last week only, I heard of that of a meritorious officer, who is an aged and war worn soldier. To this gentleman, who had grown gray in the service of his country, general Washington gave an office, which might cheer the evening of his days; the duties of it were discharged with industry and fidelity. He has been a useful citizen; he has thirteen children, and most of them are daughters, the eldest has scarcely numbered eighteen years, and the youngest not more than eight months. This gentleman has been placed on the proscribed list; not, sir, because he had been negligent of any of his duties, but because some of those hands, which (as it has been modestly said) burst open the doors of honour and confidence, were widely stretched out for rewards; to give them loaves and fishes they have been taken from the support of this numerous and lovely family. Sir, there not only exists, as my friend from North Carolina tells us, a great and destroying spirit, but there are also subordinate spirits employed in this goodly work of proscription; the master spirit, unable to take a view of the whole ground, has its under spirits; these minor spirits, within the spheres of their respective departments, are singling out objects of executive vengeance. By some of the papers, which lie before me on my desk, I see the post-master general is busily employed; every post-master and every little deputy post-master, who cannot prove his claims to executive favour, by proofs of conformity to the orthodox faith of the day, is considered as a heretic. In the persecution by the post-master general, of those who are not devoted to the party, I observe something truly ridiculous; thinking, I suppose, that public opinion would

demand some justification of this conduct, he undertakes to assign reasons for it. I observe, in the paper of this morning, the post-master general has removed one of his deputies at Augusta, in Georgia, and makes a sort of apology for it. He tells the man it is because he is a printer, and the occupations are incompatible. This gentleman writes to him that he is not a printer, and that he never was concerned directly nor indirectly in the publishing of a paper. It seems then the post-master general was mistaken, but the deputy lost his office. This lesson will prevent future explanations probably by the post-master general. It will be more convenient for him to wrap himself up in executive infallibility and insist "the king can do no wrong." The gentleman from Virginia has noticed the sedition act, and says, the present executive requires no such shield for protection; that he wants no artificial means of defence; yet in the very same breath we hear the gentleman complaining of defamatory scribblers, and of the profligacy of our presses. It does not become the honourable gentleman to complain of the public prints. It is well recollected, that when heretofore we endeavoured to check the licentiousness of the press, he and his friend insisted that its licentiousness and liberty were so closely allied, that should we attempt to touch this vein, we would run the hazard of giving a mortal wound to the great arteries of the body politic. This was formerly the language of gentlemen who are now it seems suffering from the effects of their past policy; they are now experiencing what they might have learned from a good old book, "that who soweth the wind will reap the whirlwind." It did not become them (to use our Saviour's expression) "to cast the first stone." I shall here, sir, close my observations in answer to those offered by the gentleman of Virginia, to whom I have had occasion to refer so often; permit me, however, before taking my leave of him, to

express my sorrow, that he deemed it necessary in ranging the wild field he occupied, to visit Mount Vernon, and attempt to disturb the ashes of our political father.— This circumstance was not required to prove that pre-eminence is often obnoxious; “and why must Aristides be called more just than others,” was asked by the envious Athenian who voted for his banishment. Another honourable gentleman from Virginia (Mr. Thompson) asks my friend from North Carolina, why he now mourns and sighs over the constitution, which he last year assisted to violate, and insists upon it we did wound the constitution, in putting down the two courts of Kentucky and Tennessee. Sir, it has been satisfactorily shown by my learned friend from Delaware, that the offices were not in those two instances destroyed, but modified, and that we did not take their offices from the judges, but merely assigned them new duties. This, however, the gentleman from Virginia calls wounding the constitution, and proceeds to say you did destroy two courts, and we will destroy sixteen. What, sir, will he tell us that our hands are red with the blood of the constitution to justify his embruing his? Because he thinks we then violated the constitution, will he now murder it? Sir, it was by sounding the alarm about meditated violations of the constitution, and by gross misrepresentations of our intentions, and reiterated charges of not respecting the constitution, that public opinion was vitiated, the public mind misled, and the administration of our government placed where it now is. But almost in the moment of changing, when the present administration is in its gristle, it assumes the attitude of a gladiator, attacks the judiciary, violates the rights of the judges, and says to us, *you set us the example*. Sir, had we set them the example, it was a bad one, and it does not become them to follow it; but we never gave any such examples, we always reve-

renced the judiciary as the bulwark of the constitution, and considered the rights of the judges as the rights of all the people of America. It is said by the gentleman from Virginia, that our devotion to the judiciary establishment makes us wince at any attempt to strip off some of its superfluous and expensive trappings, and that we will not part with the Corinthian and composit pillars which have been added for its decoration.

Sir, the judiciary is the fabric of the constitution, not a Corinthian pillar, not any ornament added by congress; it is, sir, the grand doric column; one of the three foundation pillars, formed not by congress, but by the people themselves; it binds together the abutment, it is laid in the foundations of the fabric of our government, and if you demolish it, the grand arch itself will totter, and the whole will be endangered. We are asked by the gentleman from Virginia, if the people want judges to protect them? Yes, sir, in popular governments constitutional checks are necessary for their preservation; the people want to be protected against themselves; no man is so absurd as to suppose the people collectedly will consent to the prostration of their liberties; but if they be not shielded by some constitutional checks they will suffer them to be destroyed; to be destroyed by demagogues, who filch the confidence of the people by pretending to be their friends; demagogues, who at the time they are soothing and cajoling the people with bland and captivating speeches, are forging chains for them; demagogues who carry daggers in their hearts, and seductive smiles in their hypocritical faces; who are dooming the people to despotism, when they profess to be exclusively the friends of the people; against such designs and such artifices were our constitutional checks made to preserve the people of this country.—Will gentlemen look back to the histories of other countries, and then tell us the people here have

nothing to apprehend from themselves? Who, sir, proved fatal to the liberties of Rome? The courtier of the people; one who professed to be "the man of the people," who had willed away his fortune to the people, and had exposed his will to the public eye; a man who, when a crown was proffered to him, shrunk from the offer, and affectedly said it did not come from the people; it was Julius Cæsar who prostrated the liberties of Rome, and yet Cæsar professed to be the friend of Rome, to be in fact *the people*. Who was it that in England destroyed the representative government, and concentrated all its powers in his own hands? One who styled himself the man of the people, who was plain, nay studiously negligent in his dress; disdaining to call himself Mister, it was plain unassuming Oliver—Oliver Cromwell, the friend of the people; the protector of the commonwealth. The gentleman from Virginia says he would rather live under a despot, than a government where the judges are as independent as we wish them to be. Had I his propensities, I like him, would fold my arms and look with indifference at this attack upon the constitution. It has been my fortune, Mr. Chairman, to have visited countries governed by despots; warned by the sufferings of the people I have seen there, I am zealous to avoid any thing which may establish a despotism here. It is because I am a republican in principle, and from education, and because I love a republican form of government and none other, that I wish to keep our constitution unchanged. Independent judges, at the same time that they are useful to the people, are harmless to them. The judges cannot impose taxes; they cannot raise armies; they cannot equip fleets; they cannot enter into foreign alliances; these are powers which are exercised without control by despots; and as the gentleman from Virginia does not hold despots in

abhorrence, he and I can never agree in our opinions on government.

Whether another honourable gentleman from Virginia (Mr. Randolph) has derived all the service from his sling and his stone he had expected, or whether he feels acquitted of his promise, and now thinks himself capable of prostrating the Goliath of this house, armed cap-a-pie, with the constitution of his country, I cannot conjecture; whether he has discovered the skill, and the prowess of David, or whether he is likened to him only by the weapons he wars with, it is for the committee to judge—for myself, I must say, that his high promises had excited expectations, which in me have not been realized; and when the gentleman sat down, I was sorry to find my objections to the bill on your table undiminished—I say sorry, for I can lay my hand upon my heart, and in the fulness of sincerity declare, there is nothing I desire more anxiously than to be convinced by gentlemen that this measure is not unconstitutional. It is not competent for us to decide where the power of judging shall be placed, as is supposed by the gentleman from Virginia, who says the only question is where this power shall be placed. Sir, the true question is where *was* this power placed by the constitution? and the honest answer must be, that it was obtained to the judiciary by the will of the people—Their power is paramount to that of the legislature, and revocable only by the authority that gave it. In deprecating the adoption in this country of the common law of England, which was brought to it by our ancestors, and the principles of which are the fundamental maxims of our liberties, the gentleman from Virginia has attempted to show the inconveniences resulting from its uncertain rules, and has noticed the case of Williams which occurred in Connecticut. Sir, I am surprised that a gentleman so correct, as he generally is, should have fallen into the

inaccuracy he has. The case of Williams is a notorious one, and it was not a prosecution at common law—the history of it is, that when general Pinckney was at Paris, he learned that some of the privateers which were then cruising against the American commerce, were commanded by Americans—as soon as this information reached congress, they passed a law to prohibit our citizens from going into the service of any of the belligerent powers. Williams continued to command a French privateer, and he had captured many of our vessels; he was afterwards brought into Connecticut, and there tried and punished; not under the common law, as the gentleman from Virginia supposed; but under our statute; under the law we passed in 1798. The gentleman has asked whether if we had created an army of judges, and given them monstrous high salaries, it would not be right to repeal the law; that if the power exists to repeal any law which might have passed on this subject, it might not now be used, and has been pleased to say we would have created more judges, and given them higher salaries, if we had not wanted nerves, and tells my honourable and learned friend from Delaware, that we were restrained by the same feebleness of nerve which induced us at the presidential election to put blank votes into the ballot box. Sir, my friend from Delaware does want that sort of nerve that some gentlemen now discover; although he is as brave as he is wise, yet in living without fear he will live without reproach, and never make himself liable to the charge of prostrating the constitution of his country. For such a work it is true he has no nerve.

The observations of one honourable gentleman from Virginia (Mr. Giles) being now reiterated by another respecting the course of conduct we pursued at the presidential election, shows that time has not abated the resentment of Virginia, which we excited by our not

voting for the Virginian candidate. Permit me here to declare, sir, that in reviewing all my public conduct, I can discover no one act of which I am more satisfied than my having put a blank vote into the ballot box—much has been said on this subject; my friend from Delaware and myself have been denounced by the jacobins of the country; at their civic feasts and in their drunken frolics we have been noticed; European renegadoes, who have left their ears on the whipping posts of their respective countries, or who have come to this country to save their ears, have endeavoured to hang out terrors to us in the public prints; nay, sir, circular letters have been diffused through the country, charging us with the intention of preventing at one time the election of a president, and at another with the design of defeating the vote of the electors, and making a president by law! This was all a calumny, and as it relates to the South Carolina delegation, I declare, they had no intention of defeating the public will; they never heard of any project for making a president by law; they had but one object in view, which they pursued, steadily, as long as there was any prospect of attaining it. The gentleman from Virginia, and the gentleman from New-York, had an equal number of votes; we preferred the latter; we voted for him more than thirty times, but when we found that our opponents would not unite with us, and seemed obstinately determined to hazard the loss of the constitution rather than join us; we ceased to vote; we told them we cannot vote with you, but by ceasing to vote, by using blank votes we will give effect to your votes; we will not choose, but we will suffer you to choose. Surely, Mr. Chairman, there was nothing in all this which had any aspect towards defeating the public will. Why I did not prefer the gentleman who ultimately was preferred has already been mentioned.—This is a subject on which I did not expect to be called

upon to explain; but the gentlemen from Virginia have called, and it was necessary to answer. Permit me to state also, that besides the objections common to my friend from Delaware and myself, there was a strong one which I felt with peculiar force. It resulted from a firm belief, that the gentleman in question held opinions respecting a certain description of property in my state, which should they obtain generally, would endanger it, and indeed lessen the value of every other. Following the example set by his colleague, the gentleman from Virginia has bestowed much censure on the past administration, and makes it a serious charge against them, having appointed under this law a gentleman of Maryland, who, he says, was not with us formerly, but unfurled his standard in the service of his king, and fought against his countrymen, whom he then deemed rebels. I did not expect, Mr. Chairman, to hear this observation from one of the friends of the executive. Since the fourth of March last, I thought philosophy had thrown her mantle over all that had passed of a criminal nature; that sins were to be forgotten and forgiven, and to prove the sincerity of this forgiving spirit, sinners were to be distinguished by executive favours—one would have thought so in reviewing executive conduct; where persons had been imprisoned and fined under our laws, they, we know, were released; where fines had actually been paid, the officers of government had been ordered to return them; and not only tories had been appointed to office, but rank old tories who had been banished. The present collector of Philadelphia, for the internal revenue, has been appointed since the fourth of March last, and although he never, like the gentleman alluded to, shivered lances in the service of his king, yet he was actively employed in the more safe service of giving information to the British generals, and marching before sir William Howe, decorated with lau-

rels, he conducted him into the metropolis of his native state. Sir, there are many instances of this kind. Have gentlemen forgotten the young Englishman, who was so busily employed here last winter, during the presidential election, that in seeing him one would really have supposed him not only a member of this house, but like him of Tennessee, holding an entire vote at his command—this youngster was sent out to this country, by some merchants in England, to collect debts due to them, and his father, whose tory principles carried him from America early in the revolution, is now subsisting on a royal pension; this young man has been appointed our consul at London, and the former consul, a native and staunch American, whose conduct had been approved by our merchants generally, has been turned out to create a vacancy. The gentleman from Virginia has repeated the observation of his colleague, that the people are capable of taking care of their own rights, and do not want a corps of judges to protect them; sir, human nature is the same every where, and man is precisely the same sort of being in the new world that he is in the old. The citizens of other republics were as wise and valiant, and far more powerful than we are. The gentleman from Virginia knows full well, that wherever the Roman standard was unfurled, its motto "*Senatus Populusque Romani*," proclaimed to a conquered world, that they were governed by the senate and the people of Rome.—But now, sir, the Roman Lazaroni, who crouching at the gates of his prince's palace begs the offals of his kitchen, would never know that his ancestors had been free—nor that the people had counted for any thing in Rome, or that Rome ever had her Senate, did he not read of them on the broken friezes and broken columns of the ruined temples, whose fragments now lie scattered over the Roman forum. Sir, the mournful histories of the republics of Rome and

Greece, are not the only beacons which warn us of the dangers of instability and innovation. All Europe was once free. But where now is the diet of Sweden? Where are the states of Holland and Portugal, and the republics of Switzerland and Italy? The people of those countries were once free and happy, but their governments, for the want of some protecting check, some inherent principle to defend themselves, have all been subverted; they have all travelled the same road; it is as plain as a turnpike; it is pointed out by the ruins of other republics; every where the same causes have produced the same effects. The government gets into the hands of theorists, and they make inroads on the constitution, perhaps with honest views—but these innovations are precedents to sanction subsequent innovations of men with bad views, and despotism succeeds to anarchy. This is what we learn from every page of history; let us profit by these monitions; let us take experience as our guide. We all have one common interest in this constitution, let us then leave it untouched; if you touch, others will ruin it—what has happened elsewhere will happen here—these gentlemen are not masons in politics and government, they cannot build up again; they are mere sappers and miners, and if they pull down this mild government, those who come after them will build up a despotic one. If you will not reject this measure, postpone it for a year; the people want no change of our constitution; give them but time, and my life on it they will say so; the president will respect public opinion, give time for its expression, and the president will subordinate his desire to destroy, to theirs to preserve. Is there no ground upon which gentlemen will meet us and compromise? If the remnant of the army is disliked, we will abolish it; if a further reduction of our little navy is desired, we will reduce it; we will join in abolishing the internal revenues—indeed, indeed, sir, there is no sacri-

fi ce we will not make to prevent the sacrifice of this constitution. Gentlemen say, the constitution will live; sir, it may last our time, but it will drag out a miserable existence after receiving this wound; it will be mortal; inflict it and you doom it to ruin; like the best and most lovely part of God's creation, violate and you destroy it; as has been observed in the house above, by a countryman and honourable friend of mine, that it will be with this constitution as with a confined fluid; if a drop of it escapes, the leak through which it steals, will soon become a breach by which the whole will pass away. This bill is an egg which will produce a brood of mortal consequences. Although the blow aimed at the constitution will not immediately destroy, the injurious effects will be immediately felt; it will soon prostrate public confidence; it will immediately depreciate the value of public property. Who will buy your lands? Who will open your western forests? Who will build upon the hills and cultivate the valleys which here surround us? He must be a speculator indeed, and his purse must overflow, who would buy your western lands and city lots, if there be no independent tribunals, where the validity of your titles will be confirmed. Have gentlemen forgot the sales of public lands made in France—the national domain was sold for assignats—after they had been well sold, and one instalment paid, the terms of payment were changed, and the purchasers were obliged to pay in specie, or relinquish the lands. Sir, look at home, and we see examples to prove the necessity of an independent judiciary. Have we not seen a state sell its western lands, and afterwards declare the law under which they were made null and void. Their nullifying law would have been declared void, had they had an independent judiciary. Whenever, in any country, judges are dependent, property is insecure. An honourable gentleman from Kentucky says, he does not

want to seek examples across the Atlantic. Sir, is this wise—are we to shut our eyes to the light of history, and turn away from the voice of experience. Sir, the untutored Indian marks on his tomahawk great events as they pass, and augurs what will happen from knowing what has happened; and shall we travel on without noticing the finger boards erected by historians for our security? The gentleman censures our having noticed France, and read a passage from a speech of the illustrious Washington, where he called the French a great and wise people.—What has been the fate of this gallant people? Where is their constitution? We have seen La Fayette in the champ de Mars at the head of 50,000 warriors, who with one hand grasping their swords, and the other laid on the altar, swore, in the presence of Almighty God, they never would desert their constitution. Through all the departments of France similar pledges were given. Frenchmen received their constitution as the followers of Mahomet did their Alcoran, and thought it came to them from Heaven. They swore on their standards, and their sabres, never to abandon it. But, sir, this constitution has vanished; the swords which were to have formed a rampart around it, are now worn by the consular janissaries, and the republican standards are among the trophies which decorate the vaulted roof of the consul's palace.

Respecting the expediency there was for passing the law, which gentlemen now seek to repeal, I shall say nothing, as my honourable friend from Delaware has entered into a most ample detail of it. Indeed, sir, he travelled through so extensive a field of enquiry respecting the unconstitutionality of the repeal as well as of the expediency of having passed the law, that he has greatly narrowed the ground for all who follow him; his range was commensurate with the extent of his mighty mind, and with the magnitude of the subject; a subject, sir, let me

tell gentlemen, that is perhaps as awful a one as any on this side of the grave. This attack upon our constitution will form a great epoch in the history of our government. In the important changes we read of, in the systems of other governments, we find some public benefit to have been intended; something plausible at least was offered in justification. But here, "when we are in the full tide of experimental success," a revolution commences without any necessity or pretence. It is not to be presumed the executive has been incited to this by the paltry consideration of saving 30,000 dollars. He has proved, by his expenditures, since the fourth of March, that our nation is not in great want of money. The fact is, sir, that so good was the management by the past administration of our fiscal concerns, that our treasury overflows with money; to this cause may be ascribed some of the great expenditures made during the recess, and which to me appear to have been perfectly useless; but perhaps they were not so. Although the senate, last session, appointed a minister to France; immediately upon its rising, the executive appointed another honourable gentleman (who now sits near me) envoy to carry over the treaty; although the French had called in their cruisers, and for us it was a time of profound peace—this gentleman was sent over in a man of war, at an enormous expense. If gentlemen will look at the printed report of the secretary of the navy, for the last year, of money necessary to be appropriated, they will read in page 52, that the expenses of the ship *Maryland* are estimated for a year at 57,269 dollars 77 cents. The *Maryland* was seven months in carrying our envoy, waiting his orders, and returning to America; and for seven months the expense of this ship would be *thirty-three thousand four hundred and seven dollars*. Perhaps all this was wise and necessary on the part of the executive. I barely state the fact. Another which I will

notice is, that without waiting for the final ratification of the treaty, or for congress to make appropriations for its fulfilment, the executive had the ship *Berceau* repaired to be delivered up to the French government, at the enormous cost of 30,000 dollars. Besides this, the officers were paid when at Boston, six dollars per day. How does all this agree with assailing the most precious part of our constitution to save a little money. But if I am under any delusion, and we are not rich; if we want to save and must save money; let us turn to something else; let us begin with ourselves. The speaker of this house receives twelve dollars a day, give him six;—we receive six, let us be content with three; on our side we cheerfully agree to this reduction. If gentlemen will look at the catalogue of expenses under the head of “*Legislature*,” they will find a number of items which if summed up will amount to 193,470 dollars; let us retrench as I have proposed, and save to the nation one half of this sum; we will in doing so save nearly 100,000 dollars a year.

Sir, gentlemen may depend upon it the people of this country are too intelligent to ascribe this measure to the mere desire of saving a little money; they will view it as the vengeance of an irritated majority. I conjure gentlemen to celebrate their victory by more harmless sports. Let them triumph over us, but not by immolating the constitution; let them beware, that in erecting a triumphal arch for the celebration of their success, they do not dig a grave, and decree funeral rites for our constitution. I repeat again, that this is not a way to save money. If saving really be the object, let our opponents procure it by more gentle means. To attempt saving a little money, by injuring the constitution, would be like taking from the foundation to patch the roof: like digging up for use the roots of a tree, instead of lopping off the boughs. To the confidence inspired by the independency of our

judges, are we indebted for much of our national prosperity. Pass this law and the tribunals of America will be like those of France, as described by the most brilliant scholar and sagacious statesman of this age. On the subject of the French judges, Mr. Burke has said, "In them it will be in vain to look for any appearance of justice towards strangers; towards the obnoxious rich; towards the minority of routed parties; towards all those who in the election have supported unsuccessful candidates. The new tribunals will be governed by the spirit of faction."—I feel myself much honoured, Mr. Chairman, by the great attention the committee have given to my observations. They have, I fear, exhausted all your stock of patience. I find they have exhausted all my strength; but the magnitude of the subject will, I trust, be an apology for their length. Permit me here to express my sorrow, at hearing the declaration of an honourable gentleman from Pennsylvania, (Mr. Gregg,) who yesterday, after joining in the call for the question, rose, and said it was useless to continue the debate, as the minds of the majority were fully made up. It seems then, gentlemen are not open to conviction, and that they are determined to violate the sanctuary. Myself, and my friends, will not, however, be deterred by this menace. We have always been the sincere friends of this constitution, and we will attempt its defence as long as we have the means of making it. We will struggle to the last; if we cannot command success, we will endeavour to deserve it;—and should the friends of the constitution be subdued by numbers, the ministerial phalanx, in bursting into the temple will, I hope, find them all at their posts; they will be seen in the portico, the vestibule, and around the altar, grasping, grappling the constitution of their country with the holds of death, and with *nollumus mutari* on their lips.

SPEECH OF MR. BAYARD,**ON THE JUDICIARY ESTABLISHMENT.****MR. CHAIRMAN,**

I MUST be allowed to express my surprise at the course pursued by the honourable gentleman from Virginia (Mr. Giles) in the remarks which he has made on the subject before us. I had expected that he would have adopted a different line of conduct. I had expected it as well from that sentiment of magnanimity which ought to have been inspired by a sense of the high ground he holds on the floor of this house, as from the professions of a desire to conciliate, which he has so repeatedly made during the session.—We have been invited to bury the hatchet, and brighten the chain of peace. We were disposed to meet on middle ground.—We had assurances from the gentleman, that he would abstain from reflections on the past, and that his only wish was that we might unite in future in promoting the welfare of our common country.—We confided in the gentleman's sincerity, and cherished the hope, that if the divisions of party were not banished from the house, its spirit would be rendered less intemperate. Such were our impressions, when the mask was suddenly thrown aside, and we saw the torch of discord lighted and blazing before our eyes. Every effort has been made to revive the animosities of the house, and to inflame the passions of the nation.—I am at no loss to perceive why this course has been pursued. The gentleman has been unwilling to rely upon the strength of his subject, and has therefore determined to make the measure a party question. He has pro-

bably secured success, but would it not have been more honourable and more commendable to have left the decision of a great constitutional question to the understanding and not to the prejudices of the house. It was my ardent wish to discuss the subject with calmness and deliberation, and I did intend to avoid every topic which could awaken the sensibility of party.—This was my temper and design when I took my seat yesterday. It is a course at present we are no longer at liberty to pursue. The gentleman has wandered far, very far from the points of the debate, and has extended his animadversions to all the prominent measures of the former administrations. In following him through his preliminary observations, I necessarily lose sight of the bill upon your table.

The gentleman commenced his strictures with the philosophic observation, that it was the fate of mankind to hold different opinions as to the form of government which was preferable. That some were attached to the monarchical, while others thought the republican more eligible. This, as an abstract remark, is certainly true, and could have furnished no ground of offence, if it had not evidently appeared that an allusion was designed to be made to the parties in this country. Does the gentleman suppose that we have a less lively recollection than himself of the oath which we have taken to support the constitution; that we are less sensible of the spirit of our government, or less devoted to the wishes of our constituents? Whatever impression it might be the intention of the gentleman to make, he does not believe that there exists in the country an anti-republican party. He will not venture to assert such an opinion on the floor of this house. That there may be a few individuals having a preference for monarchy is not improbable; but will the gentleman from Virginia, or any other gentleman affirm in his place, that there is a party in the country who wish to establish mo-

narchy? Insinuations of this sort belong not to the legislature of the union. Their place is an election ground or an ale-house. Within these walls they are lost; abroad, they have had an effect, and I fear are still capable of abusing popular credulity.

We were next told of the parties which have existed, divided by the opposite views of promoting executive power and guarding the rights of the people. The gentleman did not tell us in plain language, but he wished it to be understood, that he and his friends were the guardians of the people's rights, and that we were the advocates of the executive power.

I know that this is the distinction of party which some gentlemen have been anxious to establish; but it is not the ground on which we divide. I am satisfied with the constitutional powers of the executive, and never wished nor attempted to increase them; and I do not believe that gentlemen on the other side of the house ever had a serious apprehension of danger from an increase of executive authority. No, sir, our views as to the powers which do and ought to belong to the general and state governments, are the true source of our divisions. I co-operate with the party to which I am attached, because I believe their true object and end is an honest and efficient support of the general government, in the exercise of the legitimate powers of the constitution.

I pray to God I may be mistaken in the opinion I entertain as to the designs of gentlemen to whom I am opposed. Those designs I believe hostile to the powers of this government. State pride extinguishes a national sentiment. Whatever power is taken from this government is given to the states.

The ruins of this government aggrandize the states. There are states which are too prond to be controlled. Whose sense of greatness and resource renders them in-

different to our protection, and induces a belief, that if no general government existed, their influence would be more extensive and their importance more conspicuous. There are gentlemen who make no secret of an extreme point of depression, to which the government is to be sunk. To that point we are rapidly progressing. But I would beg gentlemen to remember, that human affairs are not to be arrested in their course, at artificial points. The impulse now given may be accelerated by causes at present out of view; and when those who now design well, wish to stop, they may find their powers unable to resist the torrent. It is not true that we ever wished to give a dangerous strength to executive power. While the government was in our hands, it was our duty to maintain its constitutional balance, by preserving the energies of each branch. There never was an attempt to vary the relation of its powers. The struggle was to maintain the constitutional powers of the executive. The wild principles of French liberty were scattered through the country. We had our jacobins and disorganizers. They saw no difference between a king and a president; and as the people of France had put down their king, they thought the people of America ought to put down their president. They who considered the constitution as securing all the principles of rational and practical liberty, who were unwilling to embark upon the tempestuous sea of revolution, in pursuit of visionary schemes, were denounced as monarchists. A line was drawn between the government and the people: and the friends of the government were marked as the enemies of the people. I hope, however, that the government and the people are now the same: and I pray to God that what has been frequently remarked, may not in this case be discovered to be true, that they who have the name of people the most often in their mouths, have their true interest the most seldom at their hearts.

The honourable gentleman from Virginia wandered to the very confines of the federal administration, in search of materials the most inflammable and most capable of kindling the passions of his party.

He represents the government as seizing the first moment which presented itself to create a dependent monied interest, ever devoted to its views. What are we to understand by this remark of the gentleman? Does he mean to say that congress did wrong in funding the public debt? Does he mean to say that the price of liberty and independence ought not to have been paid? Is he bold enough to denounce this measure as one of the federal victims marked for destruction? Is it the design to tell us that its day has not yet come, but is approaching; and that the funding system is to add to the pile of federal ruins? Do I hear the gentleman say we will reduce the army to a shadow, we will give the navy to the worms, the mint which presented the people with the emblems of their liberty and of their sovereignty, we will abolish—the revenue shall depend upon the winds and waves, the judges shall be made our creatures, and the great work shall be crowned and consecrated by relieving the country from an odious and oppressive public debt.—These steps, I presume, are to be taken in progression.

The gentleman will pause at each and feel the public pulse. As the fever increases he will proceed, and the moment of delirium will be seized to finish the great work of destruction.

The assumption of the state debts has been made an article of distinct crimination. It has been ascribed to the worst motives; to a design of increasing a dependent monied interest. Is it not well known, that those debts were part of the price of the revolution? That they rose in the exigency of our affairs, from the efforts of the particular states, at times when the federal arm could not be

extended to their relief? Each state was entitled to the protection of the union, the defence was a common burthen, and every state had a right to expect that the expenses attending its individual exertions in the general cause, would be reimbursed from the public purse. I shall be permitted further to add, that the United States having absorbed the sources of state revenue, except direct taxation, which was required for the support of the state governments, the assumption of these debts were necessary to save some of the states from bankruptcy.

The internal taxes are made one of the crimes of the federal administration.—They were imposed, says the gentleman, to create a host of dependents on executive favour. This supposes the past administrations to have been not only very wicked, but very weak. They lay taxes in order to strengthen their influence. Who is so ignorant as not to know that the imposition of a tax, would create an hundred enemies for one friend. The name of excise was odious; the details of collection were unavoidably offensive: and it was to operate upon a part the community least disposed to support public burthens, and most ready to complain of their weight. A little experience will give the gentleman a new idea of the patronage of this government. He will find it not that dangerous weapon in the hands of the administration which he has heretofore supposed it; he will probably discover that the poison is accompanied by its antidote; and that an appointment of the government, while it gives to the administration one lazy friend, will raise up against it ten active enemies.

No! The motive ascribed for the imposition of the internal taxes is as unfounded, as it is uncharitable. The federal administration, in creating burthens to support the credit of the nation, and to supply the means of its

protection, knew that they risked the favour of those upon whom their favour depended. They were willing to be the victims when the public good required.

The duties on imports and tonnage furnished a precarious revenue; a revenue at all times exposed to deficiency from causes beyond our reach. The internal taxes offered a fund less liable to be impaired by accident; a fund which did not rob the mouth of labour, but was derived from the gratification of luxury. These taxes are an equitable distribution of the public burthens. Through this medium the western country is enabled to contribute something to the expenses of a government, which has expended and daily expends, such large sums for its defence. When these taxes were laid, they were indispensable. With the aid of them, it has been difficult to prevent an increase of the public debt. And notwithstanding the fairy prospects which now dazzle our eyes, I undertake to say, if you abolish them this session, you will be obliged to restore them or supply their place by a direct tax, before the end of two years. Will the gentleman say, that the direct tax was laid in order to enlarge the bounds of patronage. Will he deny that this was a measure to which we had been urged for years by our adversaries, because they foresaw in it the ruin of federal power. My word for it, no administration will ever be strengthened by a patronage united with taxes, which the people are sensible of paying.

We were next told, that to get an army an Indian war was necessary. The remark was extremely bold, as the honourable gentleman did not allege a single reason for the position. He did not undertake to state, that it was a wanton war, or provoked by the government. He did not even venture to deny, that it was a war of defence, and entered into in order to protect our brethren on the frontiers from the bloody scalping knife, and murderous

tomahawk of the savage. What ought the government to have done? Ought they to have estimated the value of the blood which probably would be shed, and the amount of the devastation likely to be committed, before they determined on resistance? They raised an army, and after great expense and various fortune, they have secured the peace and safety of the frontiers. But, why was the army mentioned on this occasion, unless to forewarn us of the fate which awaits them, and to tell us, that their days are numbered? I cannot suppose, that the gentleman mentioned this little army distributed on a line of three thousand miles, for the purpose of giving alarm to three hundred thousand free and brave yeomanry, ever ready to defend the liberties of the country.

The honourable gentleman proceeded to inform the committee, that the government, availing itself of the depredations of the Algerines, created a navy. Did the gentleman mean to insinuate, that this war was invited by the United States? Has he any documents of proof to render the suspicion colourable? No, sir, he has none. He well knows that the Algerine aggressions were extremely embarrassing to the government. When they commenced, we had no marine force to oppose them. We had no harbours or places of shelter in the Mediterranean. A war with these pirates could be attended with neither honour or profit. It might cost a great deal of blood, and in the end it might be feared that a contest so far from home, subject to numberless hazards and difficulties, could not be maintained. What would gentlemen have had the government to do? I know there are those who are ready to answer—abandon the Mediterranean trade. But would this have done? The corsairs threatened to pass the straits, and were expected in the Atlantic. Nay, sir, it was thought that our very coasts would not have been secure.

Will gentlemen go farther, and say, that the United States ought to relinquish her commerce. I believe this opinion has high authority to support it. It has been said, that we ought to be only cultivators of the earth, and make the nations of Europe our carriers.

This is not an occasion to examine the solidity of this opinion; but I will only ask, admitting the administration were disposed to turn the pursuits of the people of this country from the ocean to the land, whether there is a power in the government, or whether there would be if we were as strong as the government of Turkey, or even France, to accomplish the object? With a sea coast of one thousand seven hundred miles, with innumerable harbours and inlets, with a people enterprising beyond example, is it possible to say, you will have no ships or sailors, nor merchants. The people of this country will never consent to give up their navigation, and every administration will find themselves constrained to provide means to protect their commerce.

In respect to the Algerines, the late administration were singularly unfortunate. They were obliged to fight or pay them. The true policy was to hold a purse in one hand, and a sword in the other. This was the policy of the government. Every commercial nation in Europe was tributary to these petty barbarians. It was not esteemed disgraceful. It was an affair of calculation, and the administration made the best bargain in their power. —They have heretofore been scandalized for paying tribute to a pirate, and now they are criminated, for preparing a few frigates to protect our citizens from slavery and chains. Sir, I believe on this and many other occasions, if the finger of heaven had pointed out a course and the government had pursued it, yet, that they would not have escaped the censure and reproaches of their enemies.

We were told, that the disturbances in Europe were made a pretext for augmenting the army and navy. I will not, Mr. Chairman, at present go into a detailed view of the events which compelled the government to put on the armour of defence, and to resist by force the French aggressions. All the world know the efforts which were made to accomplish an amicable adjustment of differences with that power. It is enough to state, that ambassadors of peace were twice repelled from the shores of France, with ignominy and contempt. It is enough to say, that it was not till after we had drank the cup of humiliation to the dregs, that the national spirit was roused to a manly resolution, to depend only on their God and their own courage for their protection. What sir, did it grieve the gentleman, that we did not crouch under the rod of the mighty nation, and like the petty powers of Europe, tamely surrender our independence? Would he have had the people of the United States, relinquish without a struggle those liberties which had cost so much blood and treasure? We had not, sir, recourse to arms, until the mouths of our rivers were choaked with French corsairs. Till our shores, and every harbour, were insulted and violated. Till half our commercial capital had been seized, and no safety existed for the remainder but the protection of force. At this moment a noble enthusiasm electrized the country—the national pulse beat high, and we were prepared to submit to every sacrifice, determined only, that our independence should be the last. At that time an American was a proud name in Europe; but I fear, much I fear, that in the course we are now likely to pursue, the time will soon arrive, when our citizens abroad will be ashamed to acknowledge their country.

The measures of 1798, grew out of the public feelings. They were loudly demanded by the public voice.

It was the people who drove the government to arms, and not as the gentleman expressed it, the government which punishes the people to the X. Y. Z. of their political designs, before they understood the A. B. C. of their political principles.

But what, sir, did the gentleman mean by his X. Y. Z. I must look for something very significant, something more than a quaintness of expression, or a play upon words, in what falls from a gentleman of his learning and ability. Did he mean that the dispatches which contained those letters were impostures designed to deceive and mislead the people of America;—intended to rouse a false spirit not justified by events. Though the gentleman had no respect for some of the characters of that embassy; though he felt no respect for the chief justice, or the gentleman appointed from South Carolina, two characters as pure, as honourable and exalted, as any country can boast of; yet, I should have expected that he would have felt some tenderness for Mr. Gerry, to whom his party had since given proofs of undiminished confidence. Does the gentleman believe that Mr. Gerry would have joined in the deception, and assisted in fabricating a tale which was to blind his countrymen, and to enable the government to destroy their liberties? Sir, I will not avail myself of the equivocations or confessions of Talleyrand himself; I say these gentlemen will not dare publicly to deny what is attested by the hand and seal of Mr. Gerry.

The truth of these dispatches admitted, what was your government to do? Give us, say the directory, 1,200,000 livres for our own purse, and purchase fifteen millions of dollars of Dutch debt, (which was worth nothing,) and we will receive your ministers and negotiate for peace.

It was only left to the government to choose between an unconditional surrender of the honour and indepen-

dence of the country, or manly resistance. Can you blame, sir, the administration for a line of conduct, which has reflected on the nation so much honour, and to which under God, it owes its present prosperity.

These are the events of the general government, which the gentleman has reviewed in succession, and endeavoured to render odious or suspicious. For all this I could have forgotten him, but there is one thing for which I will not, I cannot forgive him. I mean his attempt to disturb the ashes of the dead—Washington. Sir, I might degrade by attempting to eulogize this illustrious character. The work is infinite beyond my powers. I will only say, that as long as exalted talents and virtue confer honour among men, the name of Washington will be held in veneration.

After, Mr. Chairman, the honourable member had exhausted one quiver of arrows against the late executive, he opened another equally poisoned, against the judiciary. He told us, sir, that when the power of the government was rapidly passing from federal hands, after we had heard the thundering voice of the people which dismissed us from their service, we erected a judiciary, which we expected would afford us the shelter of an inviolable sanctuary. The gentleman is deceived. We knew better, sir, the characters who were to succeed us, and we knew that nothing was sacred in the eyes of infidels. No, sir, I never had a thought that any thing belonging to the federal government was holy in the eyes of these gentlemen. I could never therefore imagine that a sanctuary could be built up, which would not be violated. I believe these gentlemen regard public opinion because their power depends upon it, and I believe they respect no existing establishment of the government, and if public opinion could be brought to support them, I have no doubt they would annihilate the whole. I shall at present

only say further on this head, that we thought the re-organization of the judiciary system an useful measure, and we consider it as a duty to employ the remnant of our power to the best advantage of our country.

The honourable gentleman expressed his joy that the constitution had at last become sacred in our eyes—that we formerly held, that it meant every thing or nothing. I believe, sir, that the constitution formerly appeared different in our eyes from what it now appears in the eyes of the dominant party. We formerly saw in it the principles of a fair and goodly creation. We looked upon it as a source of peace, of safety, of honour, and of prosperity to the country. But now the view is changed; it is the instrument of dark and wild destruction. It is a weapon which is to prostrate every establishment, to which the nation owes the unexampled blessings which it enjoys.

The present state of the country is an unanswerable commentary upon the construction of the constitution. It is true that we made it mean much, and I hope, sir, we shall not be taught by the present administration that it can mean even worse than nothing.

The gentleman has not confined his animadversions to the individual establishment, but has gone so far as to make the judges the subject of personal invective. They have been charged with having transgressed the bounds of judicial duty, and become the apostles of a political sect. We have heard of their travelling about the country for little other purpose than to preach the federal doctrines to the people.

Sir, I think a judge should never be a partizan. No man would be more ready to condemn a judge who carried his political prejudices or antipathies on the bench. But I have still to learn that such a charge can be substantiated against the judges of the United States.

The constitution is the supreme law of the land, and
VOL. II. T

they have taken pains in their charges to grand juries to unfold and explain its principles. Upon similar occasions, they have enumerated the laws which compose our criminal code, and when some of those laws have been denounced by the enemies of the administration as unconstitutional, the judges may have felt themselves called upon to express their judgments upon that point and the reasons of their opinions.

So far, but no farther, I believe the judges have gone; and in going thus far, they have done nothing more than faithfully discharge their duty.

But if, sir, they have offended against the constitution or laws of the country, why are they not impeached? The gentleman now holds the sword of justice, the judges are not a privileged order, they have no shelter but their innocence.

But in any view are the sins of the former judges to be fastened upon the new judicial system? Would you annihilate a system, because some men under part of it had acted wrong. The constitution has pointed out a mode of punishing and removing the men, and does not leave this miserable pretext for the wanton exercise of powers which is now contemplated.

The honourable member has thought himself justified, in making a charge of a serious and frightful nature against the judges. They have been represented, going about searching out victims of the sedition law. But no fact has been stated—no proof has been adduced, and the gentleman must excuse me for refusing my belief to the charge till it is sustained by stronger and better ground than assertion.

If, however, Mr. Chairman, the eyes of the gentleman are delighted with victims, if objects of misery are grateful to his feelings, let me turn his view from the walks of the judges to the track of the present executive.

It is in this path we see the real victims of stern, uncharitable, unrelenting power. It is here, sir, we see the soldier who fought the battles of the revolution; who spilt his blood and wasted his strength to establish the independence of his country, deprived of the reward of his services and left to pine in penury and wretchedness. It is along this path, that you may see helpless children crying for bread, and gray hairs sinking in sorrow to the grave. It is here that no innocence, no merit, no truth, no services can save the unhappy sectaries, who do not believe in the creed of those in power. I have been forced upon this subject, and before I leave it, allow me to remark, that without inquiring into the right of the president to make vacancies in office, during the recess in the senate, but admitting the power to exist, yet that it never was given by the constitution to enable the chief magistrate to punish the insults, to revenge the wrongs, or to indulge the antipathies of the man. If the discretion exists, I have no hesitation in saying, that it is abused when exercised from any other motive than the public good. And when I see the will of a president precipitating from office men of probity, knowledge, and talents, against whom the community has no complaint, I consider it as a wanton and dangerous abuse of power. And where I see men who have been the victims of this abuse of power, I view them as the proper objects of national sympathy and commiseration.

Among the causes of impeachment against the judges, is their attempt to force the sovereignties of the states to bow before them. We have heard them called an ambitious body politic; and the fact I allude to, has been considered as full proof of the inordinate ambition of the body.

Allow me to say, sir, the gentleman knows too much not to know that the judges are not a body politic. He

supposed perhaps, there was an odium attached to the appellation, which it might serve his purposes to connect with the judges. But, sir, how do you derive any evidence of the ambition of the judges, from their decision that the states under our federal compact were compellable to do justice? Can it be shown or even said, that the judgment of the court was a false construction of the constitution? The policy of later times on this point has altered the constitution, and in my opinion has obliterated its fairest feature. I am taught by my principles that no power ought to be superior to justice. It is not that I wish to see the states humbled in dust and ashes; it is not that I wish to see the pride of any man flattered by their degradation; but it is that I wish to see the great and the small, the sovereign and the subject, bow at the altar of justice, and submit to those obligations from which the deity himself is not exempt. What was the effect of this provision in the constitution? It prevented the states being the judges in their own cause, and deprived them of the power of denying justice. Is there a principle of ethics more clear than that a man ought not to be a judge in his own cause, and is not the principle equally strong when applied not to one man, but to a collective body. It was the happiness of our situation, which enabled us to force the greatest state to submit to the yoke of justice, and it would have been the glory of the country in the remotest times, if the principle in the constitution had been maintained. What had the states to dread? Could they fear injustice when opposed to a feeble individual? Has a great man reason to fear from a poor one? And could a potent state be alarmed by the unfounded claim of a single person? For my part I have always thought that an independent tribunal, ought to be provided to judge on the claims against this government. The power ought not to be in our own hands. We are

not impartial, and are therefore liable without our knowledge to do wrong. I never could see why the whole community should not be bound by as strong an obligation to do justice to an individual, as one man is bound to do it to another.

In England, the subject has a better chance for justice against the sovereign, than in this country a citizen has against a state. The crown is never its own arbiter, and they who sit in judgment, have no interest in the event of their decision.

The judges, sir, have been criminated for their conduct in relation to the sedition act, and have been charged with searching for victims who were sacrificed under it. The charge is easily made, but has the gentleman the means of supporting it? It was the evident design of the gentleman to attach the odium of the sedition law to the judiciary; on this score the judges are surely innocent. They did not pass the act; the legislature made the law, and they were obliged by their oaths to execute it. The judges decided the law to be constitutional, and I am not now going to agitate the question. I did hope when the law passed, that its effect would be useful. It did not touch the freedom of speech, and was designed only to restrain the enormous abuses of the press. It went no farther than to punish malicious falsehoods published with the wicked intention of destroying the government. No innocent man ever did or could have suffered under the law. No punishment could be inflicted, till a jury was satisfied that the publication was false, and that the party charged knowing it to be false had published it with an evil design.

The misconduct of the judges, however, on this subject, has been considered by the gentleman the more aggravated by an attempt to extend the principle of the sedition act, by an adoption of those of the common

law. Connected with this subject, such an attempt was never made by the judges. They have held generally, that the constitution of the United States was predicated upon an existing common law. Of the soundness of that opinion, I never had a doubt. I should scarcely go too far, were I to say, that stript of the common law, there would be neither constitution nor government. The constitution is unintelligible without reference to the common law. And were we to go into our courts of justice with the mere statutes of the United States, not a step could be taken, not even a contempt could be punished. Those statutes prescribe no forms of pleadings, they contain no principles of evidence, they furnish no rule of property. If the common law does not exist in most cases, there is no law, but the will of the judge.

I have never contended, that the whole of the common law is attached to the constitution, but only such parts as were consonant to the nature and spirit of our government. We have nothing to do with the law of the ecclesiastical establishment, nor with any principle of monarchical tendency. What belongs to us, and what is unsuitable, is a question for the sound discretion of the judges. The principle is analogous to one which is found in the writings of all jurists, and commentators. When a colony is established, it is established subject to such parts of the law of the mother country, as are applicable to its situation. When our forefathers colonized the wilderness of America, they brought with them the common law of England. They claimed it as their birthright, and they left it as the most valuable inheritance to their children. Let me say, that this same common law, now so much despised and vilified, is the cradle of the rights and liberties which we now enjoy. It is to the common law we owe our distinction from the colonists of France, of Portugal and Spain—how long is it since we have

discovered the malignant qualities which are now ascribed to this law? Is there a state in the union which has not adopted it, and in which it is not in force? Why is it refused to the federal constitution? Upon the same principle, that every power is denied which tends to invigorate the government. Without this law, the constitution becomes, what perhaps many gentlemen wish to see it, a dead letter.

For ten years it has been the doctrines of our courts, that the common law was in force, and yet can gentlemen say, that there has been a victim who has suffered under it. Many have experienced its protection, none can complain of its oppression.

In order to demonstrate the aspiring ambition of this body politic, the judiciary, the honourable gentleman stated with much emphasis and feeling, that the judges had been hardy enough to send their mandate into the executive cabinet. Was the gentleman, sir, acquainted with the fact when he made this statement. It differs essentially from what I know I have heard upon the subject. I shall be allowed to state the fact.

Several commissions had been made out by the late administration, for justices of the peace of this territory. The commissions were complete—they were signed and sealed, and left with the clerks of the office of state, to be handed to the persons appointed. The new administration found them on the clerk's table, and thought proper to withhold them. These officers are not dependent on the will of the president. The persons named in the commissions, considered that their appointments were complete, and that the detention of their commissions was a wrong, and not justified by the legitimate authority of the executive. They applied to the supreme court, for a rule upon the secretary of state, to show cause why a mandamus should not issue, commanding

him to deliver up the commissions. Let me ask, sir, what could the judges do? The rule to show cause was a matter of course upon a law point in the least doubtful. To have denied it, would have been to shut the doors of justice against the parties. It concludes nothing, neither the jurisdiction nor the regularity of the act. The judges did their duty. They gave an honourable proof of their independence. They listened to the complaint of an individual against your president, and have shown themselves disposed to grant redress against the greatest man in the government; if a wrong has been committed, and the constitution authorises their interference, will gentlemen say, that the secretary of state, or even the president, is not subject to law? And if they violate the law, where can we apply for redress but to our courts of justice. But, sir, it is not true, that the judges issued their mandate to the executive, they have only called upon the secretary of state to show them, that what he has done is right. It is but an incipient proceeding which decides nothing.

[Mr. Giles rose to explain. He said that the gentleman from Delaware had ascribed to him many things which he did not say, and had afterwards undertaken to refute them. He had only said, that mandatory process had issued, that the course pursued by the court indicated a belief by them, that they had jurisdiction, and that in the event of no cause being shown a mandamus would issue.]

Mr. Bayard. I stated the gentleman's words as I took them down. It is immaterial whether the mistake was in the gentleman's expression, or in my understanding. He has a right to explain, and I will take his position as he now states it. I deny, sir, that mandatory process has issued. Such process would be imperative, and suppose a jurisdiction to exist; the proceeding, which has taken

place, is no more than notice of the application for justice made to the court, and allows the party to show, either that no wrong has been committed, or that the court has no jurisdiction over the subject. Even, sir, if the rule were made absolute, and the mandamus issued, it would not be definitive, but it would be competent for the secretary in a return to the writ, to justify the act which has been done, or to show that it is not a subject of judicial cognizance.

It is not till after an insufficient return that a peremptory mandamus issues. In this transaction, so far from seeing any thing culpable in the conduct of your judges, I think, sir, that they have given a strong proof of the value of that constitutional provision which makes them independent. They are not terrified by the frowns of executive power, and dare to judge between the rights of a citizen and the pretensions of a president.

I believe, Mr. Chairman, I have gone through most of the preliminary remarks which the honourable gentleman thought proper to make, before he proceeded to the consideration of those points which properly belong to the subject before the committee. I have not supposed the topics I have been discussing, had any connection with the bill on your table: but I felt it as a duty not to leave unanswered charges against the former administrations and our judges, of the most insidious tendency; which I know to be unfounded, and which were calculated and designed to influence the decision on the measure now proposed. Why, Mr. Chairman, has the present subject been combined with army, the navy, the internal taxes, and the sedition law? Was it to involve them in one common odium, and to consign them to a common fate? Do I see in the preliminary remarks of the honourable member, the title page of the volume of measures which are to be pursued? Are gentleman sen-

sible of the extent to which it is designed to lead them? They are now called on to reduce the army, to diminish the navy, to abolish the mint, to destroy the independence of the judiciary, and will they be able to stop when they are next required to blot out the public debt, that hateful source of monied interest and of aristocratic influence? Be assured, sir, we see but a small part of the system which has been formed. Gentlemen know the advantage of progressive proceedings; and my life for it, if they can carry the people with them, their career will not be arrested while a trace remains of what was done by the former administrations.

There was another remark of the honourable member, which I must be allowed to notice. The pulpit, sir, has not escaped invective. The ministers of the gospel have been represented, like the judges, forgetting the duties of their calling, and employed in disseminating the heresies of federalism. Am I then, sir, to understand that religion is also denounced, and that our churches are to be shut up? Are we to be deprived, sir, both of law and gospel? Where do the principles of the gentleman end? When the system of reform is completed, what will remain? I pray God that this flourishing country, which, under his providence, has attained such a height of prosperity, may yet escape the desolation suffered by another nation, by the practice of similar doctrines.

I beg pardon of the committee for having consumed so much time upon points little connected with the subject of the debate. Till I heard the honourable member from Virginia yesterday, I was prepared only to discuss the merits of the bill upon which you are called to vote. His preliminary remarks were designed to have an effect which I deemed it material to endeavour to counteract, and I therefore yielded to the necessity of pursuing the course he had taken, though I was conscious of depart-

ing very far from the subject before the committee. To the discussion of the subject I now return with great satisfaction, and shall consider it under the two views it naturally presents; the constitutionality and expediency of the measure. I find it most convenient to consider first the question of expediency, and shall therefore beg permission to invert the natural order of the inquiry.

To show the inexpediency of the present bill, I shall endeavour to prove the expediency of the judicial law at the last session. In doing this, it will be necessary to take a view of the leading features of the pre-existing system, to inquire into its defects, and to examine how far the evils complained of were remedied by the provisions of the late act. It is not my intention to enter into the details of the former system; it can be necessary only to state so much as will distinctly show its defects.

There existed, sir, a supreme court, having original cognizance in a few cases, but principally a court of appellate jurisdiction. This was the great national court of dernier resort. Before this tribunal questions of unlimited magnitude and consequence, both of a civil and political nature, received their final decision; and I may be allowed to call it the national crucible of justice, in which the judgments of inferior courts were to be reduced to their elements and cleansed from every impurity. There was a circuit court composed, in each district, of a judge of the supreme court and the district judge. This was the chief court of business both of a civil and criminal nature.

In each district a court was established for affairs of revenue and of admiralty and maritime jurisdiction. It is not necessary for the purposes of the present argument to give a more extensive outline of the former plan of our judiciary. We discover that the judges of the supreme court, in consequence of their composing a part

of the circuit courts, were obliged to travel from one extremity to the other of this extensive country. In order to be in the court-house two months in the year, they were forced to be on the road six. The supreme court being the court of last resort, having final jurisdiction over questions of incalculable importance, ought certainly to be filled with men not only of probity, but of great talents, learning, patience and experience. The union of these qualities is rarely, very rarely found in men who have not passed the meridian of life. My lord Coke tells us, that no man is fit to be judge, till he has numbered the lucubrations of twenty years. Men of studious habits are seldom men of strong bodies. In the course of things it could not be expected that men fit to be judges of your supreme courts, would be men capable of traversing the mountains and wildernesses of this extensive country. It was an essential and great defect in this court that it required in men the combination of qualities, which it is a phenomenon to find united. It required that they should possess the learning and experience of years and the strength and activity of youth. I may say further, Mr. Chairman, that this court, from its constitution, tended to deterioration and not to improvement. Your judges, instead of being in their closets and increasing by reflection and study their stock of wisdom and knowledge, had not even the means of repairing the ordinary waste of time. Instead of becoming more learned and more capable, they would gradually lose the fruits of their former industry. Let me ask if this was not a vicious construction of a court of the highest authority and greatest importance in the nation. In a court from which no one had an appeal, and to whom it belonged to establish the leading principles of national jurisprudence.

In the constitution of this court, as a court of last resort, there was another essential defect. The appeals to this court are from the circuit courts. The circuit court consists of the district judge and a judge of the supreme court. In cases where the district judge is interested, where he has been counsel, and where he has decided in the court below, the judge of the supreme court alone composes the circuit court. What then is substantially the nature of this appellate jurisdiction? In truth and practice the appeal is from a member of a court to the body of the same court. The circuit courts are but emanations of the supreme court. Cast your eyes on the supreme court, you see it disappear, and its members afterwards arising in the shape of circuit judges. Behold the circuit judges; they vanish and immediately you perceive the form of the supreme court appearing. There is, sir, a magic in this arrangement which is not friendly to justice. When the supreme court assembles, appeals come from the various circuits of the United States. There are appeals from the decisions of each judge. The judgments of each member pass in succession under the revision of the whole body. Will not a judge while he is examining the sentence of a brother to-day, remember that that brother will sit in judgment upon his proceedings to-morrow? Are the members of a court thus constituted, free from all motive, exempt from all bias which could even remotely influence opinion on the point of strict right; and let me ask emphatically, whether this court, being the court of final resort, should not be so constituted, that the world should believe and every suitor be satisfied, that in weighing the justice of a cause, nothing entered the scales but its true merits.

Your supreme court, sir, I have never considered as any thing more than the judges of assize sitting in bank. It is a system with which perhaps I should find no fault,

if the judges sitting in bank did not exercise a final jurisdiction. Political institutions should be so calculated as not to depend upon the virtues, but to guard against the vices and weaknesses of men. It is possible that a judge of the supreme court, would not be influenced by the *esprit du corps*, that he would neither be gratified by the affirmance nor mortified by the reversal of his opinions; but this, sir, is estimating the strength and purity of human nature upon a possible, but not on its ordinary scale.

I believe, Mr. Chairman, that in practice, the formation of the supreme court frustrated in a great degree the design of its institution. I believe that many suitors were discouraged from seeking a revision of the opinions of the circuit court, by a deep impression of the difficulties to be surmounted in obtaining the reversal of the judgment of a court, from the brethren of the judge who pronounced the judgment. The benefit of a court of appeals well constituted, is not confined to the mere act of reviewing the sentence of an inferior court, but is more extensively useful by the general operation of the knowledge of its existence upon inferior courts. The power of uncontrollable decision is of the most delicate and dangerous nature. When exercised in the courts, it is more formidable than by any other branch of our government. It is the judiciary only which can reach the person, the property, or life of an individual. The exercise of their power is scattered over separate cases, and creates no common cause. The great safety under this power arises from the right of appeal. A sense of this right combines the reputation of the judge, with the justice of the cause. In my opinion it is a strong proof of the wisdom of a judicial system, when few causes are carried into the court of the last resort. I would say, if it were not paradoxical, that the very existence of a court of appeals ought to destroy the occasion for it. The conscience of

the judge, sir, will no doubt be a great check upon him in the unbounded field of discretion created by the uncertainty of law, but I should in general cases rely more upon the effect produced by his knowledge, that an inadvertent or designed abuse of power was liable to be corrected by a superior tribunal. A court of appellate jurisdiction organized upon sound principles should exist, though few cases arose for their decision; for it is surely better to have a court and no causes, than to have causes and no court. I now proceed, sir, to consider the defects which are plainly discernible, or which have been discovered by practice in the constitution of the circuit courts.

These courts, from information which I have received, I apprehend were originally constructed upon a fallacious principle. I have heard it stated, that the design of placing the judges of the supreme court in the circuit courts, was to establish uniform rules of decision throughout the United States. It was supposed, that the presiding judges of the circuit courts proceeding from the same body, would tend to identify the principles and rules of decision in the several districts. In practice, a contrary effect has been discovered to be produced by the peculiar organization of these courts. In practice we have found not only a want of uniformity of rule between the different districts, but no uniformity of rule in the same district. No doubt there was an uniformity in the decisions of the same judge, but as the same judge seldom sat twice successively in the same district, and sometimes not till after an interval of two or three years, his opinions were forgotten or reversed before he returned. The judges were not educated in the same school. The practice of the courts, the forms of proceeding as well as the rules of property, are extremely various in the different quarters of the United States. The lawyers of

the eastern, the middle, and southern states, are scarcely professors of the same science. These courts were in a state of perpetual fluctuation. The successive terms gave you courts in the same district, as different from each other as those of Connecticut and Virginia. No system of practice could grow up, no certainty of rule could be established. The seeds sown in one term, scarcely vegetated before they were trodden under foot. The condition of a suitor was terrible—the ground was always trembling under his feet. The opinion of a former judge was no precedent to his successor. Each considered himself bound to follow the light of his own understanding. To exemplify these remarks, I will take the liberty of stating a case which came under my own observation. An application before one judge, was made to quash an attachment in favour of a subsequent execution creditor—the application was resisted upon two grounds, and the learned judge, to whom the application was first made, expressing his opinion in support of both grounds, dismissed the motion. At the succeeding court a different judge presided, and the application was renewed and answered upon the same grounds. The second learned judge was of opinion, that one point had no validity, but he considered the other sustainable, and was about also to dismiss the motion, but upon being pressed at last consented to grant a rule to show cause. At the third term, a third learned judge was on the bench, and though the case was argued upon its former principles, he was opinion, that both answers to the application were clearly insufficient, and accordingly quashed the attachment. When the opinions of his predecessors were cited, he replied, that every man was to be saved by his own faith. Upon the opinion of one judge, a suitor would set out in a long course of proceedings and after losing much time and wasting much money, he would be met by

another judge, who would tell him he had mistaken his road, that he must return to the place from which he started, and pursue a different track. Thus it happened as to the chancery process to compel the appearance of a defendant. Some of the judges considered themselves bound by the rules in the English books, while others conceived that a power belonged to the court upon the service of a subpoena to make a short rule for the defendant to appear and answer, or that the bill should be taken *pro confesso*. A case of this kind occurred, where much embarrassment was experienced. In the circuit court for the district of Pennsylvania, a bill in chancery was filed against a person, who then happened to be in that district, but whose place of residence was in the North Western Territory. The subpoena was served, but there was no answer nor appearance. The court to which the writ was returned, without difficulty, upon an application, granted a rule for the party to appear and answer at the expiration of a limited time, or that the bill be taken *pro confesso*. A personal service of this rule being necessary, the complainant was obliged to hire a messenger to travel more than a thousand miles to serve a copy of the rule. At the ensuing court, affidavit was made of the service and a motion to make the rule absolute. The scene immediately changed, a new judge presided, and it was no longer the same court.

The authority was called for, to grant such a rule; was it warranted by any act of congress, or by the practice of the state? It was answered there is no act of congress, the state has no court of chancery. But this proceeding was instituted and has been brought to its present stage, at considerable expense, under the direction of this court. The judge knew of no power the court had to direct the proceeding, and he did not consider that the complainant could have a decree upon his bill

without going through a long train of process found in the books of chancery practice. The complainant took this course, and at a future time was told by another judge, that he was incurring an unnecessary loss of time and money, and that a common rule would answer his purpose. I ask you, Mr. Chairman, if any system could be devised more likely to produce vexation and delay. Surely, sir, the law is uncertain enough in itself, and its paths sufficiently intricate and tedious, not to require that your suitors should be burthened with additional embarrassments by the organization of your courts.

The circuit is the principal court of civil and criminal business; the defects of this court were therefore most generally and sensibly felt. The high characters of the judges at first brought suitors into the courts; but the business was gradually declining, though causes belonging to the jurisdiction of the courts were multiplying; the continual oscillation of the court baffled all conjecture as to the correct course of the proceeding or the event of a cause. The law ceased to be a science. To advise your client it was less important to be skilled in the books, than to be acquainted with the character of the judge who was to preside. When the time approached, the inquiry was, what judge are we to have? What is his character as a lawyer? Is he acquainted with chancery law? Is he a strict common lawyer, or a special pleader?

When the character of the judge was ascertained, gentlemen would then, considering the nature of their causes, determine whether it was more advisable to use means to postpone or to bring them to a hearing.

The talents of the judges rather increased the evil, than afforded a corrective for the vicious constitution of these courts. They had not drawn their knowledge from the same sources: their systems were different, and hence

the character of the court more essentially changed at each successive term. Those difficulties and embarrassments banished suitors from the court, and without more than a common motive, recourse was seldom had to the federal tribunals.

I do not pretend, Mr. Chairman, to have enumerated all the defects which belonged to the former judicial system. But I trust those which I have pointed out, in the minds of candid men, will justify the attempt of the legislature to revise that system, and to make a fairer experiment of that part of the plan of our constitution which regards the judicial power. The defects, sir, to which I have alluded, had been a long time felt and often spoken of. Remedies had been frequently proposed. I have known the subject brought forward in congress, or agitated in private, ever since I have had the honour of a seat on this floor. I believe, sir, a great and just deference for the author of the ancient scheme, prevented any innovation upon its material principles; there was no gentleman that felt that deference more than myself, nor should I have ever hazarded a change upon speculative opinion, but practice had discovered defects which might well escape the most discerning mind in planning the theory. The original system could not be more than experiment; it was built upon no experience. It was the first application of principles to a new state of things. The first judicial law displays great ability, and it is not in the least a disparagement of the author, to say its plan is not perfect.

I know, sir, that some have said, and perhaps not a few have believed, that the new system was introduced, not so much with a view to its improvement of the old, as to the places which it provided for the friends of the administration. This is a calumny so notoriously false, and so humble, as not to require nor to deserve an an-

swer upon this floor. It cannot be supposed that the paltry object of providing for sixteen unknown men, could have ever offered an inducement to a great party, basely to violate their duty; meanly to sacrifice their character; and foolishly to forego all future hopes.

I have ever considered it also, as a defect in this court, that it was composed of judges of the highest and lowest grades. This, sir, was an unnatural association; the members of the court stood on ground too unequal, to allow the firm assertion of his opinion to the district judge. Instead of being elevated, he felt himself degraded by a seat upon the bench of this court. In the district court he was every thing, in the circuit court he was nothing. Sometimes he was obliged to leave his seat, while his associate reviewed the judgment which he had given in the court below. In all cases he was sensible that the sentences in the court in which he was, were subject to the revision and control of a superior jurisdiction, where he had no influence, but the authority of which was shared by the judge with whom he was acting. No doubt in some instances, the district judge was an efficient member of this court, but this never arose from the nature of the system, but from the personal character of the man. I have yet, Mr. Chairman, another fault to find with the ancient establishment of the circuit courts. They consisted only of two judges, and sometimes of one. The number was too small, considering the extent and importance of the jurisdiction of the court. Will you remember, sir, that they hold the power of life and death, without appeal. That their judgments were final over sums of two thousand dollars, and their original jurisdiction restrained by no limits of value, and that this was the court to which appeals were carried from the district courts.

I have often heard, sir, that in a multitude of council,

there was wisdom; and if the converse of the maxim be equally true, this court must have been very deficient. When we saw a single judge reversing the judgment of the district court, the objection was not striking, but the court never had the weight which it ought to have possessed and would have enjoyed, had it been composed of more members.

But two judges belonging to the court, an inconvenience was sometimes felt from a division of their opinions. And this inconvenience was but poorly obviated by the provision of the law, that in such cases the cause should be continued to the succeeding term, and receive its decision from the opinion of the judge who should then preside.

I now come, Mr. Chairman, to examine the changes which were made by the late law. This subject has not been correctly understood. It has every where been erroneously represented. I have heard much said about the additional courts created by the act of last session. I perceive them spoken of in the president's message. In the face of this high authority, I undertake to state, that no additional court was established by that law. Under the former system there was one supreme court, and there is but one now. There were seventeen district courts, and there are no more now. There was a circuit court held in each district, and such is the case at present. Some of the district judges are directed to hold their courts at new places, but there is still in each district but one district court. What, sir, has been done? The unnatural alliance between the supreme and district courts has been severed, but the jurisdiction of both those courts remain untouched. The power or authority of neither of them has been augmented or diminished. The jurisdiction of the circuit court has been extended to the cognizance of debts of four hundred dollars, and

this is the only material change in the power of that court. The chief operation of the late law is a new organization of the circuit courts. To avoid the evils of the former plan, it became necessary to create a new corps of judges. It was considered that the supreme court ought to be stationary, and to have no connexion with the judges over whose sentences they had an appellate jurisdiction.

To have formed a circuit court out of the district judges, would have allowed no court of appeal from the district court, except the supreme court, which would have been attended with great inconvenience. But this scheme was opposed by a still greater difficulty. In many districts the duties of the judge require a daily attention. In all of them business of great importance may on unexpected occurrences require his presence.

This plan was thought of; it was well examined and finally rejected, in consequence of strong objections to which it was liable. Nothing therefore remained, but to compose the circuit court of judges distinct from those of the other courts. Admitting the propriety of excluding from this court the judges of the supreme and district courts, I think the late congress cannot be accused of any wanton expense nor even of a neglect of economy in the new establishment. This extensive country has been divided into six circuits, and three judges appointed, for each circuit. Most of the judges have twice a year to attend a court in three states, and there is not one of them who has not to travel farther, and who in time will not have more labour to perform than any judge of the state courts. When we call to mind that the jurisdiction of this court reaches the life of the citizen, and that in civil cases its judgments are final to a large amount; certainly it will not be said that it ought to have been composed of less than three judges. One was surely

not enough, and if it had been doubtful whether two were not sufficient, the inconvenience, which would have frequently arisen from an equal division of opinion, justifies the provision which secures a determination in all cases.

It was additionally very material to place on the bench of this court, a judge from each state, as the court was in general bound to conform to the law and the practice of the several states.

I trust, sir, the committee are satisfied that the number of judges which compose the circuit court is not too great, and that the legislature would have been extremely culpable, to have committed the high power of the court to fewer hands. Let me now ask, if the compensation allowed to these judges is extravagant. It is little more than half the allowance made to the judges of the supreme court. It is but a small proportion of the ordinary practice of those gentlemen of the bar who are fit, and to whom we ought to look to fill the places. You have given a salary of two thousand dollars. The puisne judges of Pennsylvania, I believe, have more. When you deduct the expenses of the office, you will leave but a moderate compensation for service, but a scanty provision for a family. When, Mr. Chairman, gentlemen coolly consider the amendments of the late law, I flatter myself their candour will at least admit that the present modification was fairly designed to meet and remedy the evils of the old system.

The supreme court has been rendered stationary. Men of age, of learning, and experience, are now capable of *holding* a seat on the bench; they have time to mature their opinions in causes on which they were called to decide, and they have leisure to devote to their books, and to augment their store of knowledge. It was our hope by the present establishment of the court, to render

it the future pride and honour and safety of the nation. It is this tribunal which must stamp abroad the judicial character of our country. It is here that ambassadors and foreign agents resort for justice, and it belongs to this high court to decide finally, not only on controversies of unlimited value between individuals, and on the more important collision of state pretensions, but also upon the validity of the laws of the states, and of this government. Will it be contended that such great trust ought to be reposed in feeble or incapable hands. It has been asserted that this court will not have business to employ it. The assertion is supported neither by what is past, nor by what is likely to happen. During the present session of congress, at their last term, the court was fully employed for two weeks in the daily hearing of causes. But its business must increase. There is no longer that restraint upon appeals from the circuit court, which was imposed by the authority of the judge of the court to which the appeal was to be carried; no longer will the apprehension of a secret, unavoidable bias in favour of the decision of a member of their own body, shake the confidence of a suitor, in resorting to this court, who thinks that justice has not been done to him in the court below. The progressive increase of the wealth and population of the country, will unavoidably swell the business of the court. But there is a more certain and unfailing source of employment, which will arise in the appeals from the courts of the national territory. From the courts of original cognizance in this territory, it affords the only appellate jurisdiction. If gentlemen will look to the state of property, of a vast amount in this city, they must be satisfied that the supreme court will have enough to do for the money which is paid them.

Let us next consider, sir, the present state of the circuit courts.

There are six courts which sit in twenty-two districts, each court visits at least three districts, some four. The courts are now composed of three judges of equal power and dignity. Standing on equal ground their opinions will be independent and firm. Their number is the best for consultation, and they are exempt from the inconvenience of an equal division of opinion. But what I value most, and what was designed to remedy the great defect of the former system, is the identity which the court maintains. Each district has now always the same court. Each district will hereafter have a system of practice and uniformity of decision. The judges of each circuit will now study, and learn and retain the laws and practice of their respective districts. It never was intended, nor is it practicable, that the same rule of property or of proceeding should prevail from New Hampshire to Georgia. The old courts were enjoined to obey the laws of the respective states. Those laws fluctuate with the will of the state legislatures, and no other uniformity could ever be expected, but in the construction of the constitution and statutes of the United States. This uniformity is still preserved by the control of the supreme court over the courts of the circuits. Under the present establishment, a rational system of jurisprudence will arise. The practice and local laws of the different districts may vary, but in the same district they will be uniform. The practice of each district will suggest improvements to the others, the progressive adoption of which will in time assimilate the systems of the several districts.

It is unnecessary, Mr. Chairman, for me to say any thing in relation to the district courts. Their former jurisdiction was not varied by the law of the last session.

It has been my endeavour, sir, to give a correct idea of the defects of the former judicial plan, and of the remedies for those defects introduced by the law now designed to be repealed. I do not pretend to say that the present system is perfect, I contend only that it is better than the old. If, sir, instead of destroying, gentlemen will undertake to improve the present plan, I will not only applaud their motives, but will assist in their labour. We ask only that our system may be tried. Let the sentence of experience be pronounced upon it. Let us hear the national voice after it has been felt. They will then be better able to judge its merits. In practice it has not yet been complained of; and as it is designed for the benefit of the people, how can their friends justify the act of taking it from them before they have manifested their disposition to part with it?

How, sir, am I to account for the extreme anxiety to get rid of this establishment? Does it proceed from that spirit which since power has been given to it, has so unrelentingly persecuted men in office who belonged to a certain sect? I hope there will be a little patience: these judges are old and infirm men; they will die; they must die; wait but a short time, their places will be vacant; they will be filled with the disciples of the new school, and gentlemen will not have to answer for the political murder which is now meditated.

I shall take the liberty now, sir, of paying some attention to the objections which have been expressed against the late establishment. An early exception which, in the course of the debate, has been abandoned by most gentlemen, and little relied on by any one, is the additional expense. The gentleman from Virginia, stated the expense of the present establishment at one hundred and thirty-seven thousand dollars. On this head the material question is, not what is the expense of the whole esta-

blishment, but what will be saved by the repealing law on the table. I do not estimate the saving at more than twenty-eight thousand five hundred dollars. You save nothing but the salaries of sixteen judges of two thousand dollars each. From this amount is to be deducted the salary of a judge of the supreme court, which is three thousand five hundred dollars. Abolishing the present system will not vary the incidental expenses of the circuit court. You revive a circuit court whose incidental expenses will be equal to those of the court you destroy. The increased salaries of the district judges of Kentucky and Tennessee must remain. It is not proposed to abolish their offices, and the admissions upon the other side allow that the salaries cannot be reduced.

If there were no other objection, the present bill could not pass without amendment, because it reduces the salaries of those judges, which is a plain undeniable infraction of the constitution. But, sir, it is not a fair way of treating the subject to speak of the aggregate expense. The great inquiry is, whether the judges are necessary, and whether the salaries allowed to them are reasonable? Admitting the utility of the judges, I think no gentleman will contend, that the compensation is extravagant.

We are told of the expense attending the federal judiciary. Can gentlemen tell me of a government under which justice is more cheaply administered; add together the salaries of all your judges, and the amount but little exceeds the emoluments of the chancellor of England. Ascertain the expenses of state justice, and the proportion of each state of the expense of federal justice, and you will find that the former is five times greater than the latter. Do gentlemen expect that a system expanded over the whole union, is to cost no more than the establishment of a single state? Let it be remembered, sir, that the judiciary is an integral and co-ordinate part with

the highest branches of the government. No government can long exist without an efficient judiciary. It is the judiciary which applies the law and enables the executive to carry it into effect. Leave your laws to the judiciaries of the states to execute, and my word for it, in ten years you have neither law nor constitution. Is your judiciary so costly that you will not support it? Why then lay out so much money upon the other branches of your government? I beg that it will be recollected that if your judiciary costs you thousands of dollars, your legislature costs you hundreds of thousands, and your executive millions.

An objection has been derived from the paucity of causes in the federal courts, and the objection has been magnified by the allegation, that the number had been annually decreasing. The facts admitted, I draw a very different inference from my opponents. In my opinion they furnish the strongest proof of the defects of the former establishment, and of the necessity of a reform. I have no doubt, nay, I know it to be a fact, that many suitors were diverted from those tribunals by the fluctuations to which they were subject. Allow me, however, to take some notice of the facts. They are founded upon the presidential document, No. 8. Taking the facts as there stated, they allow upwards of fifty suits annually for each court; when it is considered that these causes must each have exceeded the value of five hundred dollars, and that they were generally litigated cases, I do not conceive, that there is much ground to affirm, that the courts were without business.

But, sir, I must be excused for saying, I pay little respect to this document. It has been shown by others in several points to be erroneous, and from my own knowledge, I know it to be incorrect. What right had the president to call upon the clerks to furnish him with

a list of the suits which had been brought, or were depending in their respective courts? Had this been directed by congress, or was there any money appropriated to pay the expense? Is there any law existing which made it the duty of the clerks to obey the order of the executive? Are the clerks responsible for refusing the lists, or for making false or defective returns? Do we know any thing about the authenticity, or of the certificates furnished improperly by the clerks? And are we not aiming a mortal blow at one branch of the government, upon the credit, and at the instigation of another and a rival department? Yes, sir, I say at the instigation of the president, for I consider this business wholly as a presidential measure: This document and his message, show that it originated with him: I consider it as now prosecuted by him, and I believe, that he has the power to arrest its progress, or to accomplish its completion. I repeat that it is his measure. I hold him responsible for it; and I trust in God that the time will come, when he will be called upon to answer for it as his act. And I trust the time will arrive, when he will hear us speaking upon the subject more effectually.

It has been stated as the reproach, sir, of the bill of the last session, that it was made by a party at the moment when they were sensible that their power was expiring and passing into other hands. It is enough for me, that the full and legitimate power existed. The remnant was plenary and efficient; and it was our duty to employ it according to our judgments and consciences for the good of the country. We thought the bill a salutary measure, and there was no obligation upon us to leave it as a work for our successors. Nay, sir, I have no hesitation in avowing, that I had no confidence in the persons who were to follow us: and I was the more anxious while we had the means to accomplish a work

which I believed they would not do, and which I sincerely thought would contribute to the safety of the nation, by giving strength and support to the constitution, through the storm to which it was likely to be exposed. The fears which I then felt, have not been dispelled, but multiplied by what I have since seen. I know nothing which is to be allowed to stand. I observe the institutions of the government falling around me, and where the work of destruction is to end God alone knows. We discharged our consciences in establishing a judicial system, which now exists, and it will be for those who now hold the power of the government to answer for the abolition of it, which they at present meditate. We are told, that our law was against the sense of the nation. Let me tell these gentlemen, they are deceived when they call themselves the nation. They are only a dominant party, and though the sun of federalism should never rise again, they will shortly find men better or worse than themselves thrusting them out of their places. I know it is the cant of those in power, however they have acquired it, to call themselves the nation. We have recently witnessed an example of it abroad. How rapidly did the nation change in France: Brissot called himself the nation—then Robespierre; afterwards Tallien and Barras, and finally Bonaparte—but their dreams were soon dissipated, and they awoke in succession upon the scaffold, or in banishment. Let not these gentlemen flatter themselves, that heaven has reserved for them a peculiar destiny. What has happened to others in this country, they must be liable to. Let them not exult too highly in the enjoyment of a little brief and fleeting authority. It was ours yesterday, it is theirs to-day, but to-morrow it may belong to others.

Saturday, February 20, 1802.

I owe to the committee the expression of my thanks for the patience with which they attended to the laborious discussion of yesterday.

It will be my endeavour in the remarks which I have to offer upon the remaining point of the debate, to consume no time which the importance of the subject does not justify. I have never departed from the question before the committee, but with great reluctance. Before I heard the gentleman from Virginia, I had not an observation to make unconnected with the bill on the table. It was he who forced me to wander on foreign ground, and be assured, sir, I shall be guilty of no new digressions where I am not covered by the same justification.

I did think that this was an occasion when the house ought to have been liberated from the dominion of party spirit, and allowed to decide upon the unbiassed dictates of their understanding. The vain hope which I indulged that this course would be pursued, was soon dissipated by the inflammatory appeal made by the gentleman from Virginia, to the passions of his party. This appeal, which treated with no respect the feelings of one side of the house, will excuse recriminations which have been made, or which shall be retorted. We were disposed to conciliate, but gentlemen are deceived if they think that we will submit to be trampled on.

I shall now, sir, proceed to the consideration of the second point which the subject presents. However this point may be disguised by subtilties, I conceive the true question to be, has the legislature a right by a law to remove a judge? Gentlemen may state their question to be, has the legislature a right by law to vacate the office of a judge? But, as in fact they remove the judges, they are bound to answer our question.

The question which I state they will not meet. Nay, I have considered it as conceded upon all hands, that the legislature have not the power of removing a judge from his office; but it is contended only that the office may be taken from the judge. Sir, it is a principle in law, which ought, and I apprehend does, hold more strongly in politics, that what is prohibited from being done directly is restrained from being done indirectly. Is there any difference but in words between taking the office from a judge and removing the judge from the office? Do you not indirectly accomplish the end, which you admit is prohibited. I will not say that it is the sole intention of the supporters of the bill before us, to remove the circuit judges from their offices; but I will say that they establish a precedent, which will enable worse men than themselves to make use of the legislative power for that purpose upon any occasion. If it be constitutional to vacate the office, and in that way to dismiss the judge, can there be a question as to the power to recreate the office and to fill it with another man? Repeal to-day the bill of the last session, and the circuit judges are no longer in office. To-morrow rescind this repealing act (and no one will doubt the right to do it) and no effect is produced but the removal of the judges. To suppose that such a case may occur is no vagary of imagination. The thing has been done, shamelessly done, in a neighbouring state. The judges there held their offices upon the same tenure with the judges of the United States. Three of them were obnoxious to the men in power. The judicial law of the state was repealed, and immediately re-enacted without a veil being thrown over the transaction. The obnoxious men were removed, their places supplied with new characters, and the other judges were re-appointed.—Whatever sophistry may be able to show in theory, in practice there never will be found a

difference in the exercise of the powers of removing a judge and of vacating his office.

The question, which we are now considering, depends upon the provisions contained in the constitution. It is an error of the committee, upon plain subjects to search for reasons very profound. Upon the present subject the strong provisions of the constitution are so obvious, that no eye can overlook them. They have been repeatedly cited, and as long as the question stated is under discussion, they must be reiterated. There are two prominent provisions to which I now particularly allude. 1st. The judges shall hold their offices during good behaviour. 2d. Their compensation shall not be diminished during their continuance in office. These are provisions so clearly understood upon the first impression, that their meaning is rather obscured than illustrated by argument. What is meant and what has been universally understood by the tenure of "good behaviour?" *A tenure for life*, if the judge commit no misdemeanor. It is so understood and expressed in England, and so it has always been received and admitted in this country. The *express* provision then of the constitution defines the tenure of a judge's office, a tenure during life. How is that tenure *expressly* qualified? By the good behaviour of the judge. Is the tenure qualified by any other *express* condition or limitation? No other. As the tenure is *express*, as but one *express* limitation is imposed upon it, can it be subject to any other limitation not derived from necessary implication. If any material provision in the constitution can in no other manner be satisfied, than by subjecting the tenure of this office to some new condition, I will then admit that the tenure is subject to the condition.

Gentlemen have ventured to point out a provision which they conceived furnished this necessary implication. They refer to the power given to congress from time to time to

establish courts inferior to the supreme court. If this power cannot be exercised without vacating the offices of existing judges, I will concede that those offices may be vacated. But on this head there can be no controversy. The power has been and at all times may be exercised without vacating the office of any judge. It was so exercised at the last session of congress; and I surely do not now dispute the right of gentlemen to establish as many new courts as they may deem expedient. The power to establish new courts does not therefore necessarily imply a power to abolish the offices of existing judges, because the existence of those offices does not prevent an execution of the power.

The clause in the constitution to which I have just alluded has furnished to gentlemen their famous position, that though you cannot remove a judge from his office, you may take the office from the judge. Though I should be in order, I will not call this a quibble, but I shall attempt, in the course of the argument, yet more clearly to prove that it is one. I do not contend that you cannot abolish an empty office, but the point on which I rely is, that you can do no act which impairs the independence of a judge. When gentlemen assert that the office may be vacated notwithstanding the incumbency of the judge, do they consider that they beg the very point which is in controversy. The office cannot be vacated without violating the express provision of the constitution in relation to the tenure.

The judge is to hold the office during good behaviour. Does he hold it when it is taken from him? Has the constitution said, that he shall hold the office during good behaviour, unless congress shall deem it expedient to abolish the office? If this limitation has been omitted, what authority have we to make it a part of the constitution?

The second plain, unequivocal provision, on this subject is, that the compensation of the judge shall not be

diminished during the time he continues in office. This provision is directly levelled at the power of the legislature. They alone could reduce the salary. Could this provision have any other design than to place the judge out of the power of congress; and yet how imperfect and how absurd the plan. You cannot reduce a part of the compensation, but you may extinguish the whole. What is the sum of this notable reasoning? You cannot remove the judge from the office, but may take the office from the judge. You cannot take the compensation from the judge, but you may separate the judge from the compensation.

If your constitution cannot resist reasoning like this, then indeed is it waste paper.

I will here turn aside, in order to consider a variety of arguments drawn from different sources, on which gentlemen on the other side have placed a reliance. I know of no order in which they can be classed, and I shall therefore take them up as I meet with them on my notes. It was urged by the honourable member from Virginia, to whom I have so frequently referred, that what was created by law, might by law be annihilated. In the application of his principle, he disclosed views which, I believe, have not yet been contemplated by gentlemen of his party. He was industrious to show that not only the inferior courts, but the supreme court, derives its existence from law. The president and legislature exist under the constitution. They came into being without the aid of a law. But though the constitution said, there should be a supreme court, no judges could exist till the court was organized by law. This argument, I presume, was published to this extent in order to give notice to the judges of the supreme court of their fate, and to bid them prepare for their end.

I shall not attempt to discriminate between the tenure

of the offices of the judges of the supreme and inferior courts: congress has power to organize both descriptions of courts, and to limit the number of judges, *but they have no power to limit or define the tenure of offices.* Congress creates the offices; the president appoints the officer: but it is neither under congress or the president, but under the constitution, that the judge claims to hold the office during good behaviour. The principle asserted does not in this case apply; the tenure of office is not created by law, and if the truth of the principle were admitted, it would not follow that the tenure of the office might be vacated by law. But the principle is not sound. I will show a variety of cases which will prove its fallacy. Among the obnoxious measures of the late administration, was the loan of five millions, which was funded at 8 per cent. The loan was created by a law and funded by law. Is the gentleman prepared to say, that this debt which was funded by a law of the former legislature, may be extinguished by a law of the present. Can you, by calling the interest of this debt exorbitant and usurious, justify the reduction of it? Gentlemen admit, that the salary of a judge, though established by a law, cannot be diminished by a law. The same thing must be allowed with respect to the salary of the president. Sir, the true principle is, that one legislature may repeal the act of a former, in cases not prohibited by the constitution. The correct question therefore is, whether the legislature are not forbidden by the constitution to abridge the tenure of a judicial office?

In order to avoid cases of a nature similar to those which I have put, the gentleman from Kentucky, (Mr. Davis) and after him the gentleman from Virginia, endeavoured to draw a distinction between the laws executed and laws executory.

The distinction was illustrated by reference to the case of a state admitted by a law into the union. Here it is said

the law is executed, and *functus officio*, and if you repeal it, still the state remains a member of the union. But it was asked by the gentleman from Kentucky, supposing a law made to admit a state into the union, at a future time, before the time of admission arrived, could not the law be repealed? I will answer the question to the satisfaction of the gentleman, by stating a case which exists. By an ordinance of congress, in the year 1787, congress ordained, that when the population within the limits of a state within the North Western territory, should amount to 60,000 souls, the district should be admitted as a member of the union. Will the gentleman venture to doubt as to this case? Would he dare to tell the people of this country, that congress had the power to disfranchise them.

The law, in the case I refer to, is executory, though the event upon which it is to take effect is limited by population and not by time?

But, sir, if there were any thing in the principle, it has no influence upon the case to which it has been applied. A law has created the office of a judge, the judge has been appointed and the office filled. The law is therefore executed, and upon the very distinction of the gentleman, cannot be repealed. The law fixing the compensation is executory, and so is that which establishes the salary of the President; but though executory, they cannot be repealed. The distinction therefore is idle, and leaves the question upon the ground of the repeal being permitted or prohibited by the constitution. I shall now advert, sir, to an argument urged with great force and not a little triumph, by the honourable member from Virginia. This argument is derived from the word '*hold*' in the expression, the judge shall *hold* his office during good behaviour. It is considered as correlative to tenure. The gentleman remarks, that the constitution provides, that the president

shall nominate the judge to his office, and when approved by the senate, shall commission him. It is hence inferred, that as the president nominates and commissions the judge, the judge *holds* the office of the president; and that when the constitution provides, that the tenure of the office shall be during good behaviour, the provision applies to the president, and restrains the power which otherwise would result in consequence of the offices being *holden* of him, to remove the judges at will. This is an argument, sir, which I should have thought that honourable member would have been the last person upon this floor to have adopted. It not only imputes to the president royal attributes, but prerogatives, derived from the rude doctrines of the feudal law. Does the gentleman mean to contend, that the president of these states, like the monarch of England, is the fountain of honour, of justice and of office? Does he mean to contend, that the courts are the president's courts, and the judges, the president's judges? Does he mean to say, sir, that the chief magistrate is always supposed to be present in these courts, and that the judges are but the images of his justice? To serve the paltry purposes of this argument, would the gentleman be willing to infuse into our constitution, the vital spirit of the feudal doctrines? He does not believe, he cannot believe, that when the word 'hold' was employed, any reference was had to its feudal import. The language of the constitution furnishes no support to this feudal argument. These officers are not called the judges of the president, but the judges of the United States. They are a branch of the government equally important, and designed to be co-ordinate with the president. If, sir, because the president nominates to office and commissions, the office is held of him—for a stronger reason, where by patent he grants lands of the United States, the lands are held of him. And upon the grantee's dying without heirs, the lands would

escheat not to the United States but to the president. In England, the tenure of lands and offices is derived from the same principle. All lands are held mediately, or immediately of the crown, because they are supposed to have been originally acquired from the personal grant of the monarch. It is the same of office, as the king is supposed to be the source of all offices. Having the power to grant, he has a right to define the terms of the grant. These terms constitute the tenure. When the terms fail, the tenure ceases, and the object of the grant reverts to the granter. This gentleman has charged others with monarchical tendencies, but never have I before witnessed an attempt so bold and strong to incorporate in our constitution, a rank monarchical principle. If, sir, the principle of our constitution on this subject be republican and not monarchical, and the judges hold their offices of the United States, and not of the president, then the application of his argument has all the force against the gentleman, which he designed it should have against his adversaries. For if the office be held of the United States, and the tenure of good behaviour was designed to restrain the power of those of whom the office was holden, it will follow, that it was the intention to restrain the power of the United States.

We were told by an honourable gentleman from Virginia, who rose early in the debate (Mr. Thompson) that the principles we advocated tended to establish a sinecure system in the country. Sir, I am as little disposed to be accessary to the establishment of such a system, as any gentleman on this floor. But let me ask how this system is to be produced? We established judicial offices, to which numerous and important duties were assigned. A compensation has been allowed to the judges, which no one will say, is immediate, or disproportioned to the service to be rendered. These gentlemen first abolish the

duties of the offices; then call the judges pensioners; and afterwards accuse us of establishing sinecures. There are no pensioners at present; if there should be any, they will be the creatures of this law. I have ever considered it as a sound and moral maxim, that no one should avail himself of his own wrong. It is a maxim, which ought to be equally obligatory upon the public as upon the private man. In the present case, the judge offers you his service. You cannot say, it is not worth the money you pay for it. You refuse to accept the service; and after engaging to pay him while he continued to perform the service, you deny him his compensation, because he neglects to render services which you have prevented him from performing. Was injustice ever more flagrant? Surely, sir, the judges are innocent. If we did wrong, why should they be punished and disgraced? They did not pass the obnoxious law, they did not create the offices, they had no participation in the guilty business: but they were invited upon the faith of government, to renounce their private professions, to relinquish the emolument of other employments, and to enter into the service of the United States, who engaged to retain them during their lives, if they were guilty of no misconduct. They have behaved themselves well, unexceptionably well, when they find the government rescinding the contract made with them, refusing the stipulated price of their labour, dismissing them from service, and in order to cover the scandalous breach of faith, stigmatizing them with names which may render them odious to their countrymen. Is there a gentleman on the floor of this house, who would not revolt at such conduct in private life? Is there one who would feel himself justified, after employing a person for a certain time, and agreeing to pay a certain compensation, to dismiss the party from the service upon any caprice which altered his views, deny him the stipulated compensation, and to

abuse him with opprobrious names, for expecting the benefit of the engagement?

A bold attempt was made by one of the gentlemen from Virginia, (Mr. Giles) to force to his aid the statute of 13th Wm. III. I call it a bold attempt, because the gentleman was obliged to rely upon his own assertion to support the ground of his argument. He stated, that the clause in the constitution was borrowed from a similar provision in the statute. I know nothing about the fact, but I will allow the gentleman its full benefit. In England, at an early period, the judges held their commissions during the good pleasure of the monarch. The parliament desired, and the king consented, that the royal prerogative should be restrained. That the offices of the judges should not depend on the will of the crown alone, but upon the joint pleasure of the crown and the parliament. The king consented to part with a portion of his prerogative, by relinquishing his power to remove the judges without the advice of his parliament. *But by an express clause in the statute, he retained the authority to remove them with the advice of his parliament.* Suppose the clause had been omitted, which reserved the right to remove upon the address of the two houses of parliament, and the statute had been worded in the unqualified language of our constitution, that the judges should hold their offices during good behaviour, would not the prerogative of removal have been abolished altogether? I will not say that the honorable member has been particularly unfortunate in the employment of this argument, because, sir, it appears to me, that most to which he has had recourse, when justly considered, have operated against the cause they were designed to support.

The gentleman tells us that the constitutional provision on this subject was taken from the statute of William—Will he answer me this plain question: Why do we find omitted in the constitution, that part of the statutory pro-

vision, which allowed the judges to be removed upon the address of the two branches of the legislature? Does he suppose that the clause was not observed? Does he imagine that the provision was dropt through inadvertency? Will he impute so gross a neglect to an instrument, every sentence, and word, and comma, of which, he has told us was so maturely considered, and so warily settled. No, sir, it is impossible; and give me leave to say, that if this part of the constitution were taken from the statute (and the gentleman from Virginia must have better information on the subject than I have) that a stronger argument could not be admitted to show that it was the intention of those who framed the constitution, by omitting that clause in the statute which made the judges tenants of their offices at the will of parliament, to improve in this country the English plan of judicature, by rendering the judges independent of the legislature. And I shall have occasion in the course of my observations to show, that the strongest reasons derived from the nature of our government, and which do not apply to the English form, require the improvement to be made.

Upon this point, sir, we may borrow a few additional rays of light from the constitutions of Pennsylvania, of Delaware, and of some other states. In those states it has been thought, that there might be misconduct on the part of a judge not amounting to an impeachable offence, for which he should be liable to be removed. Their constitutions therefore have varied from that of the United States, and rendered the judges liable to be removed upon the address of two thirds of each branch of the legislature. Does it not strike every mind, that it was the intention of their constitutions to have judges independent of a majority of each branch of the legislature; and I apprehend also that it may be fairly inferred, that it was understood in those states, when their constitutions were formed, that

even two-thirds of each branch of the legislature would not have power to remove a judge whose tenure of office was during good behaviour, unless the power was expressly given to them by the constitution. I cannot well conceive of a thing more absurd in an instrument as signed to last for centuries and to bias the furious passions of party, than to fortify one pass to judicial independence, and leave another totally unguarded against the violence of legislative power.

It has been urged by the gentleman from Virginia, that our admission that congress has a power to modify the office of judge, leads to the conclusion, that they have the power to abolish the office. Because, by paring away these powers they may at length reduce them to a shadow, and leave them as humble and as contemptible as a court of piepoudre. The office of a judge consists in judicial powers which he is appointed to execute. Every law which is passed increases or diminishes those powers, and so far modifies the office: nay, it is competent for the legislature to prescribe additional duties or to dispense with unnecessary services, which are connected with the office of the judge. But that power has its bounds. You may modify the office to any extent which does not affect the independence of the judges. The judge is to hold the office during good behaviour; now modify as you please, so that you do not infringe the constitutional provision.

Do you ask me to draw a line and say, thus far you can go and no farther. I admit no line can be drawn. It is an affair of sound and *bona fide* discretion.—Because a discretion on the subject is given to the legislature, to argue upon the abuse of that discretion is adopting a principle subversive of all legitimate power.

The constitution is predicated upon the existence of a certain degree of integrity in man. It has trusted powers liable to enormous abuse, if all political honesty be dis-

carded. The legislature is not limited in the amount of the taxes which they have a right to impose, nor as to the objects to which they are to be applied. Does this power give us the property of the country, because by taxes we might draw it into the public coffers, and then cut up the treasury and divide the spoils? Is there any power in respect to which a precise line can be drawn, between the discreet exercise and the abuse of it.

I can only say therefore on this subject, that every man is acquitted to his own conscience who *bona fide* does not intend, and who sincerely does not believe, that by the law which he is about to pass, he interferes with the judges holding their offices during good behaviour.

I am now brought, Mr. Chairman, to take notice of some remarks which fell from the gentleman from Virginia, which do not belong to the subject before us, but are of sufficient importance to deserve particular attention. He called our attention in a very impressive manner to the state of parties in this house, at the time when the act of the last session passed. He describes us in a state of blind paroxysm, incapable of discerning the nature or tendency of the measures we were pursuing. That a majority of the house were struggling to counteract the expression of the public will, in relation to the person who was to be the chief magistrate of the country.

I did suppose, sir, that this business was at an end, and I did imagine that as gentlemen had accomplished their object, they would have been satisfied. But as the subject is again renewed, we must be allowed to justify our conduct. I know not what the gentleman calls an expression of the public will. There were two candidates for the office of president, who were presented to the house of representatives with equal suffrages. The constitution gave us the right and made it our duty to elect that one of the two whom we thought preferable. A public man is to

notice the public will as constitutionally expressed. The gentleman from Virginia and many others have had their preference, but that preference of the public will did not appear by its constitutional expression. Sir, I am not certain, that either of those candidates had a majority of the country in his favour. Excluding the state of South Carolina, the country was equally divided. We know that parties in that state were nearly equally balanced, and the claims of both the candidates were supported by no other scrutiny into the public will, that our official return of votes. Those votes are very imperfect evidence of the true will of a majority of the nation. They resulted from political intrigue, and artificial arrangement.

When we look at the votes we must suppose, that every man in Virginia voted the same way. These votes are received as a correct expression of the public will. And yet we know, that if the votes of that state were apportioned according to the several voices of the people, that at least seven out of twenty-one, would have been opposed to the successful candidate. It was the suppression of the will of one-third of Virginia, which enables gentlemen now to say, that the present chief magistrate is the man of the people. I consider that as the public will, which is expressed by the constitutional organs. To that will I bow and submit. The public will, thus manifested, gave the house of representatives the choice of the two men for president. Neither of them was the man whom I wished to make president, but my election was confined by the constitution to one of the two, and I gave my vote to the one who I thought was the greater and better man. That vote I repeated, and in that vote I should have persisted, had I not been driven from it by imperious necessity. The prospect ceased of the vote being effectual, and the alternative only remained of tak-

ing one man for president, or having no president at all. I chose, as I then thought, the lesser evil.

From the scene in this house, the gentleman carried us to one in the senate. I should blush, sir, for the honour of the country, could I suppose that the law designed to be repealed, owed its support in that body to the motives which have been indicated. The charge designed to be conveyed, not only deeply implicates the integrity of individuals of the senate, but of the person who was then the chief magistrate. The gentleman, going beyond all precedent, has mentioned the names of members of that body, to whom commissions issued from offices not created by the bill before them, but which that bill by the promotions it afforded was likely to render vacant. He has considered the scandal of the transaction, as aggravated by the issuing of commissions for offices not actually vacant, upon the bare presumption that they would become vacant, by the incumbents accepting commissions for higher offices which were issued in their favour. The gentleman has particularly dwelt upon the indecent appearance of the business from two commissions being held by different persons at the same time for the same office.

I beg that it will be understood, that I mean to give no opinion as to the regularity of granting a commission for a judicial office, upon the probability of a vacancy, before it is actually vacant, but I shall be allowed to say that so much doubt attends the point, that an innocent mistake might be made on the subject. I believe, sir, it has been the practice to consider the acceptance of an office, as relating to the date of the commission. The officer is allowed his salary from the date, upon the principle that the commission is a grant of the office, and the title commences with the date of the grant. This principle is certainly liable to abuse, but where there was a suspicion of abuse, I pre-

sume the government would depart from it. Admitting the office to pass by the commission, and the acceptance to relate to its date, it then does not appear very incorrect, in the case of a commission for the office of a circuit judge, granted to a district judge, as the acceptance of the commission for the former office relates to the date of the commission, to consider the latter office as vacant from the same time. The offices are incompatible. You cannot suppose the same person in both offices at the same time. From the moment, therefore, that you consider the office of circuit judge filled by a person who holds the commission of district judge, you must consider the office of district judge as vacated. The grant is contingent. If the contingency happen, the office vests from the date of the commission, if the contingency does not happen the grant is void. If this reasoning be sound, it was not irregular in the late administration, after granting a commission to a district judge, for the place of a circuit judge, to make a grant of the office of the district judge, upon the contingency of his accepting the office of circuit judge. I now return, sir, to that point of the charge, which was personal in its nature, and of infinitely the most serious import. It is a charge as to which, we can only ask, *is it true?* If it be true, it cannot be excused; it cannot be palliated; it is vile profligate corruption, which every honest mind will execrate. But, sir, we are not to condemn, till we have evidence of the fact. If the offence be serious, the proof ought to be plenary. I will consider the evidence of the fact, upon which the honourable member has relied, and I will show him by the application of it to a stronger case, that it is of a nature to prove nothing.

Let me first state the principal case. Two gentlemen of the senate, Mr. Read of South Carolina, and Mr. Green of Rhode Island, who voted in favour of the law of last session, each received an appointment to the place

of district judge, which was designed to be vacated by the promotion of the district judge to the office of circuit judge. The gentleman conveyed to us a distinct impression of his opinion, that there was an understanding between these gentlemen and the president, and that the offices were the promised price of their votes.

I presume, sir, the gentleman will have more charity, in the case which I am about to mention, and he will for once admit that public men ought not to be condemned, upon loose conclusions drawn from equivocal presumptions.

The case, sir, to which I refer, carries me once more to the scene of the presidential election. I should not have introduced it into this debate, had it not been called up by the honourable member from Virginia. In that scene I had my part; it was a part not barren of incident, and which has left an impression, which cannot easily depart from my recollection. I know who were rendered important characters, either from the possession of personal means, or from the accident of political situation. And now, sir, let me ask the honourable member, what his reflections and belief will be when he observes that every man, on whose vote the event of the election hung, has since been distinguished by presidential favour. I fear, sir, I shall violate the decorum of parliamentary proceeding, in the mentioning of names, but I hope the example which has been set me will be admitted as an excuse. Mr. Charles Pinckney of South Carolina was not a member of the house, but he was one of the most active, efficient and successful promoters of the election of the present chief magistrate. It was well ascertained that the votes of South Carolina were to turn the equal balance of the scales. The zeal and industry of Mr. Pinckney had no bounds. The doubtful politics of South Carolina were decided, and her votes cast into the scale of Mr. Jefferson.

Mr. Pinckney has since been appointed minister plenipotentiary to the court of Madrid. An appointment as high and honourable, as any within the gift of the executive. I will not deny that this preferment is the reward of talents and services, although, sir, I have never yet heard of the talents or the services of Mr. Charles Pinckney. In the house of representatives I know what was the value of Mr. Claiborne of Tennessee. The vote of a state was in his hands. Mr. Claiborne has since been raised to the high dignity of governor of the Mississippi Territory. I know how great and how greatly felt, was the importance of the vote of Mr. Linn of New Jersey. The delegation of the state consists of five members. Two of the delegation were decidedly for Mr. Jefferson; two were decidedly for Mr. Burr. Mr. Linn was considered as inclining to one side, but still doubtful. Both parties looked up to him for the vote of New Jersey. He gave it to Mr. Jefferson, and Mr. Linn has since had the profitable office of supervisor of his district conferred upon him. Mr. Lyon of Vermont was in this instance an important man. He neutralized the vote of Vermont. His absence alone would have given the vote of a state to Mr. Burr. It was too much to give an office to Mr. Lyon; his character was low. But Mr. Lyon's son has been handsomely provided for in one of the executive offices. I shall add to the catalogue but the name of one more gentleman, Mr. Edward Livingston, of New York. I knew well—full well I knew the consequence of this gentleman. His means were not limited to his own vote—nay, I always considered more than the vote of New York within his power. Mr. Livingston has been made the attorney for the district of New York—the road of preferment has been opened to him—and his brother has been raised to the distinguished place of minister plenipotentiary to the French republic. This catalogue might be swelled to a much greater magnitude; but I fear, Mr.

Chairman, were I to proceed further, it might be supposed, that I myself harboured the uncharitable suspicions of the integrity of the chief magistrate, and of the purity of the gentlemen whom he thought proper to promote, which it is my design alone to banish from the mind of the honourable member from Virginia. It would be doing me great injustice to suppose, that I have the smallest desire, or have had the remotest intention to tarnish the fame of the present chief magistrate, or of any of the honourable gentlemen who have been the objects of his favour, by the statement which I have made; my motive is of an opposite nature. The late president appointed gentlemen to office, to whom he owed no personal obligations, but who only supported what has been considered as a favourite measure. This has been assumed as a sufficient ground, not only of suspicion, but of condemnation. The present executive, leaving scarcely an exception, has appointed to office, or has, by accident, indirectly gratified every man, who had any distinguished means in the competition for the presidential office, of deciding the election in his favour. Yet, sir, all this furnishes too feeble a presumption to warrant me to express a suspicion of the integrity of a great officer, or of the probity of honourable men in the discharge of the high functions which they had derived from the confidence of their country. I am sure, sir, in this case, the honourable member from Virginia is as exempt from any suspicion as myself. And I shall have accomplished my whole object, if I induce that honourable member, and other members of the committee, who entertain his suspicions as to the conduct of the late executive, to review the ground of those suspicions, and to consider that in a case furnishing much stronger ground for the presumption of criminality, they have an unshaken belief, an unbroken confidence in the purity and fairness of the executive conduct.

I return again to the subject before the committee, from the unpleasant digression to which I was forced to submit, in order to repel insinuations which were calculated to have the worst effect, as well abroad as within the walls of this house. I shall now cursorily advert to some arguments of minor importance, which are supposed to have some weight by gentlemen on the other side. It is said that if the courts are sanctuaries and the judges cannot be removed by law, it would be in the power of a party to create a host of them to live as pensioners on the country. This argument is predicated upon an extreme abuse of power, which can never fairly be urged to restrain the legitimate exercise of it; as well might it be urged, that a subsequent congress had a right to reduce the salary of a judge, or of the president, fixed by a former congress, because if the right did not exist, one congress might confer a salary of 500,000 or 1,000,000 dollars, to the impoverishment of the country. It will be time enough to decide upon those extreme cases when they occur. We are told that the doctrine we contend for, enables one legislature to derogate from the power of another. That it attributes to a former a power which it denies to a subsequent legislature.

This is not correct. We admit that this congress possesses all the power possessed by the last congress. That congress had a power to establish courts, so has the present. That congress had not, nor did it claim the power to abolish the office of a judge while it was filled. Though they thought five judges under the new system sufficient to constitute the supreme court, they did not attempt to touch the office of either of the six judges. Though they considered it more convenient to have circuit judges in Kentucky, and Tennessee, than district judges, they did not lay their hands upon the offices of the district judges. We therefore deny no power to this congress which was

not denied to the last. An honourable member from Virginia, (Mr. Thompson) seriously expressed his alarm, lest the principle we contended for should introduce into the country a privileged order of men. The idea of the gentleman supposes, that every office not at will establishes a privileged order. The judges have their offices for one term; the president, the senators and the members of this house for different terms. While these terms endure, there is a privilege to hold the places, and no power exists to remove. If this be what the gentleman means by a privileged order, and he agrees, that the president, the senators and the members of this house belong to privileged orders, I shall give myself no trouble to deny, that the judges fall under the same description; and I believe, that the gentleman will find it difficult to show, that in any other manner they are privileged. I did not suppose, that this argument was so much addressed to the understandings of gentlemen upon this floor, as to the prejudices and passions of people out of doors.

It was urged with some impression by the honourable member from Virginia, to whom I last referred, that the position that the office of a judge might be taken from him by law, was not a new doctrine. That it was established by the very act now designed to be repealed, which was described in glaring language to have inflicted a gaping wound on the constitution, and to have stained with its blood the pages of our statute book. It shall be my task, sir, to close this gaping wound, and to wash from the pages of our statute book, the blood with which they were stained. It will be an easy task to show to you the constitution without a wound, and the statute books without a strain.

It is, sir, the 27th sect. of the bill of the last session, which the honourable member considers as having inflicted the ghastly wound on the constitution, of which he has

so feelingly spoken. That section abolishes the ancient circuit courts. But, sir, have we contended, or has the gentleman shown, that the constitution prohibits the abolition of a court when you do not materially affect or in any degree impair the independence of a judge. A court is nothing more than a place where a judge is directed to discharge certain duties. There is no doubt, you may erect a new court and direct it to be holden by the judges of the supreme or of the district courts. And if it should afterwards be your pleasure to abolish that court, it cannot be said, that you destroy the offices of the judges by whom it was appointed that the court should be holden.

Thus it was directed by the original judicial law, that a circuit court should be holden at York town, in the district of Pennsylvania. This court was afterwards abolished, but it was never imagined that the office of any judge was affected. Let me suppose, that a state is divided into two districts, and district courts established in each, but that one judge is appointed by law to discharge the judicial duties in both courts. The arrangement is afterwards found inconvenient, and one of the courts is abolished. In this case will it be said, that the office of the judge is destroyed, or his independence affected?—The error, into which gentlemen have fallen on this subject, has arisen from their taking for granted, what they have not attempted to prove, and what cannot be supported; that the office of a judge and any court in which he officiates are the same thing. It is most clear, that a judge may be authorized and directed to perform duties in several courts, and that the discharging him from the performance of duty in one of those courts cannot be deemed an infringement of his office. The case of the late circuit courts as plainly illustrates the argument, and as conclusively demonstrates its correctness, as any case which can be put. There were not nominally any judges of the circuit court.

The court was directed to be holden by the judges of the supreme and of the district courts. The judges of these two courts were associated and directed to perform certain duties; when associated and in the performance of those duties, they were denominated the circuit court. This court is abolished; the only consequence is, that the judges of the supreme and district courts are discharged from the performance of the joint duties which were previously imposed upon them. But is the office of one judge of the supreme or of the district courts infringed? Can any judge say, in consequence of the abolition of the circuit courts, I no longer hold my office during good behaviour? On this point it was further alleged by the same honourable member, that the law of the last session inflicted another wound on the constitution, by abolishing the district courts of Kentucky and Tennessee. The gentleman was here deceived by the same fallacy which misled him on the subject of the circuit courts. If he will give himself the trouble of carefully reviewing the provisions of the law, he will discern the sedulous attention of the legislature to avoid the infringement of the offices of those judges. I believe the gentleman went so far as to charge us with appointing by law their judges to new offices.

The law referred to establishes a circuit, comprehending Kentucky, Tennessee and the district of Ohio. The duties of the court of this circuit are directed to be performed by a circuit judge and the two district judges of Kentucky and Tennessee. Surely it is competent for the legislature to create a court, and to direct that it shall be holden by any of the existing judges. If the legislature had done with respect to all the district judges, what they have done with respect to those of Kentucky and Tennessee, I am quite certain, that the present objections would have appeared entirely groundless. Had they directed, that all the circuit courts should be held by the respective judges within the

circuits, gentlemen would have clearly seen, that this was only an imposition of a new duty and not an appointment to a new office.

It will be recollected, that under the old establishment, the district judges of Kentucky and Tennessee were invested generally with the powers of the circuit judges. The ancient powers of those judges are scarcely varied by the late law, and the amount of the change is, that they are directed to exercise those powers in a court formerly called a district, but now a circuit court, and at other places than those to which they were formerly confined. But the district judge nominally remains, his office both nominally and substantially exists, and he holds it now as he did before, during good behaviour. I will refer gentlemen to different provisions in the late law, which will show beyond denial, that the legislature carefully and pointedly avoided the act of abolishing the offices of those judges.

The seventh section of the law provides that the court of the sixth circuit shall be composed of a circuit judge "*and the judges of the district courts of Kentucky and Tennessee.*" It is afterwards declared in the same section, "that there shall be appointed in the sixth circuit, a judge of the United States to be called a circuit judge, who, together with *the district judge of the courts of Tennessee and Kentucky*, shall hold the circuit courts hereby directed to be holden within the same circuit." And finally, in the same section it is provided, "*that whenever the office of district judge in the districts of Kentucky and Tennessee respectively shall become vacant*, such vacancies shall respectively be supplied by the appointment of two additional circuit judges in the said circuit, who, together with the circuit judge first aforesaid, shall compose the circuit courts of the said circuit." When the express language of the law affirms the existence of the office and of the officer, by providing for the contingency

of the officer ceasing to fill the office, with what face can gentlemen contend that the *office* is abolished? They who are not satisfied upon this point, I despair of convincing upon any other.

Upon the main question, whether the judges hold their offices at the will of the legislature, an argument of great weight and according to my humble judgment, of irresistible force, still remains.

The legislative power of the government is not absolute but limited. If it be doubtful whether the legislature can do what the constitution does not explicitly authorize; yet there can be no question, that they cannot do what the constitution expressly prohibits. To maintain, therefore, the constitution, the judges are a check upon the legislature. This doctrine I know is denied, and it is therefore incumbent upon me to show that it is sound.

It was once thought by gentlemen who now deny the principle, that the safety of the citizen and of the states, rested upon the power of the judges to declare an unconstitutional law void. How vain is a paper restriction if it confers neither power nor right. Of what importance is it to say, congress are prohibited from doing certain acts, if no legitimate authority exists in the country to decide whether an act done is a prohibited act? Do gentlemen perceive the consequences which would follow from establishing the principle, that congress have the exclusive right to decide upon their own powers? This principle admitted, does any constitution remain? Does not the power of the legislature become absolute and omnipotent? Can you talk to them of transgressing their powers, when no one has a right to judge of those powers but themselves? They do what is not authorized, they do what is inhibited, nay at every step they trample the constitution under foot; yet their acts are lawful and binding, and it is treason to resist them. How ill, sir, do the doctrines

and professions of these gentlemen agree. They tell us they are friendly to the existence of the states; that they are the friends of federative, but the enemies of a consolidated general government; and yet, sir, to accomplish a paltry object, they are willing to settle a principle which, beyond all doubt, would eventually plant a consolidated government, with unlimited power, upon the ruins of the state governments.

Nothing can be more absurd than to contend that there is a practical restraint upon a political body who are answerable to none but themselves for the violation of the restraint, and who can derive from the very act of violation, undeniable justification of their conduct.

If, Mr. Chairman, you mean to have a constitution, you must discover a power to which the acknowledged right is attached of pronouncing the invalidity of the acts of the legislature which contravene the instrument.

Does the power reside in the states?—Has the legislature of a state a right to declare an act of congress void? This would be erring upon the opposite extreme. It would be placing the general government at the feet of the state governments. It would be allowing one member of the union to control all the rest. It would inevitably lead to civil dissention and a dissolution of the general government. Will it be pretended that the state courts have the exclusive right of deciding upon the validity of our laws?

I admit they have the right to declare an act of congress void. But this right they enjoy in practice, and it ever essentially must exist subject to the revision and control of the courts of the United States. If the state courts definitively possessed the right of declaring the invalidity of the laws of this government, it would bring us in subjection to the states. The judges of those courts, being bound by the laws of the state, if a state declared an act of congress unconstitutional, the law of the state

would oblige its courts to determine the law invalid. This principle would also destroy the uniformity of obligation upon all the states, which should attend every law of this government. If a law were declared void in one state, it would exempt the citizens of that state from its operation, whilst obedience was yielded to it in the other states. I go farther, and say, if the state or state courts had a final power of annulling the acts of this government, its miserable and precarious existence would not be worth the trouble of a moment to preserve.

It would endure but a short time, as a subject of derision, and wasting into an empty shadow, would quickly vanish from our sight. Let me now ask if the power to decide upon the validity of our laws resides with the people. Gentlemen cannot deny this right to the sovereign people. I admit they possess it. But if at the same time it does not belong to the courts of the United States, where does it lead the people? It leads them to the gallows. Let us suppose that congress, forgetful of the limits of their authority, pass an unconstitutional law.— They lay a direct tax upon one state and impose none upon the others. The people of the state taxed, contest the validity of the law. They forcibly resist its execution. They are brought by the executive authority before the courts upon charges of treason. The law is unconstitutional, the people have done right, but the court are bound by the law, and obliged to pronounce upon them the sentence which it inflicts. Deny to the courts of the United States, the power of judging upon the unconstitutionality of our laws, and it is in vain to talk of it existing elsewhere. The infractors of the laws are brought before these courts, and if the courts are implicitly bound, the invalidity of the laws can be no defence. There is, however, Mr. Chairman, still a stronger ground of argument upon this subject. I shall select one or two cases to

illustrate it. Congress are prohibited from passing a bill of attainder; it is also declared in the constitution, that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the party attainted." Let us suppose that congress pass a bill of attainder, or they enact that any one attainted of treason shall forfeit to the use of the United States all the estate which he held in any lands or tenements.

The party attainted is seized and brought before a federal court, and an award of execution passed against him. He opens the constitution and points to this line, "no bill of attainder or ex post facto law shall be passed." The attorney for the United States reads the bill of attainder.

The court are bound to decide, but they have only one alternative of pronouncing *the law or the constitution invalid*. It is left to them only to say that the law vacates the constitution, or the constitution avoids the law. So in the other case stated, the heir after the death of his ancestor, brings his ejectment in one of the courts of the United States to recover his inheritance. The law by which it is confiscated is shown. The constitution gave no power to pass such a law. On the contrary it expressly denied it to the government. The title of the heir is rested on the constitution, the title of the government on the law. The effect of one destroys the effect of the other; the court must determine which is effectual.

There are many other cases, Mr. Chairman, of a similar nature, to which I might allude. There is the case of the privilege of habeas corpus, which cannot be suspended but in times of rebellion or invasion. Suppose a law prohibiting the issuing of the writ at a moment of profound peace. If in such case the writ were demanded of a court, could they say, it is true legislature were restrained from passing the law, suspending the privilege

of this writ, at such a time as that which now exists, but their mighty power has broken the bonds of the constitution, and fettered the authority of the court. I am not, sir, disposed to vaunt, but standing on this ground, I throw the gauntlet to any champion upon the other side. I call upon them to maintain, that in a collision between a law and the constitution, the judges are bound to support the law, and annul the constitution. Can the gentlemen relieve themselves from this dilemma? Will they say, though a judge has no power to pronounce a law void, he has a power to declare the constitution invalid.

The doctrine for which I am contending is not only clearly inferable from the plain language of the constitution, but by law has been expressly declared and established in practice since the existence of the government.

The second section of the third article of the constitution expressly extends the judicial power to all cases arising under the constitution, the laws, &c. The provision in the second clause of the sixth article leaves nothing to doubt. "This constitution and *the laws of the United States which shall be made in pursuance thereof, &c.* shall be the supreme law of the land." The constitution is absolutely the supreme law. Not so of the acts of the legislature. Such only are the laws of the land as are made *in pursuance of the constitution*.

I beg the indulgence of the committee one moment, while I read the following provision from the 25th section of the judicial act of the year 1789: "A final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, *where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, &c.* may be re-examined and reversed or *affirmed* in the supreme court of the United States upon a writ of error." Thus, as early

as the year 1789, among the first acts of the government, the legislature explicitly recognised the right of a state court to declare a treaty, a statute, and an authority exercised under the United States void, subject to the revision of the supreme court of the United States; and it has expressly given the final power to the supreme court to affirm a judgment which is against the validity either of a treaty, statute or an authority of the government.

I humbly trust, Mr. Chairman, that I have given abundant proofs from the nature of our government, from the language of the constitution, and from legislative acknowledgment, that the judges of our courts have the power to judge and determine upon the constitutionality of our laws.

Let me now suppose that in our frame of government the judges are a check upon the legislature; that the constitution is deposited in their keeping. Will you say afterwards that their existence depends upon the legislature? That the body whom they are to check has the power to destroy them? Will you say that the constitution may be taken out of their hands, by a power the most to be distrusted, because the only power which could violate it with impunity? Can any thing be more absurd than to admit, that the judges are a check upon the legislature, and yet to contend that they exist at the will of the legislature? A check must necessarily imply a power commensurate to its end. The political body designed to check another must be independent of it, otherwise there can be no check.—What check can there be, when the power designed to be checked can annihilate the body which is to restrain it?

I go further, Mr. Chairman, and take a stronger ground. I say, in the nature of things, the dependence of the judges upon the legislature, and their right to declare the acts of the legislature void, are repugnant, and cannot

exist together.—The doctrine, sir, supposes two rights—first, the right of the legislature to destroy the office of the judge, and the right of the judge to vacate the act of the legislature. You have a right to abolish by a law, the offices of the judges of the circuit courts. They have a right to declare your law void. It unavoidably follows in the exercise of these rights, either that you destroy their rights, or that they destroy yours. This doctrine is not an harmless absurdity, it is a most dangerous heresy. It is a doctrine which cannot be practised without producing not discord only, but bloodshed. If you pass the bill upon your table the judges have a constitutional right to declare it void. I hope they will have courage to exercise that right; and if, sir, I am called upon to take my side, standing acquitted in my conscience, and before my God, of all motives but the support of the constitution of my country, I shall not tremble at the consequences.

The constitution may have its enemies, but I know that it has also its friends. I beg gentlemen to pause before they take this rash step. There are many, very many who believe, if you strike this blow, you inflict a mortal wound on the constitution. There are many now willing to spill their blood to defend that constitution. Are gentlemen disposed to risk the consequences? Sir, I mean no threats—I have no expectation of appalling the stout hearts of my adversaries; but if gentlemen are regardless of themselves, let them consider their wives and children, their neighbours and their friends. Will they risk civil dissention; will they hazard the welfare, will they jeopardize the peace of the country, to save a paltry sum of money, less than thirty thousand dollars?

Mr. Chairman, I am confident that the friends of this measure are not apprised of the nature of its operation, nor sensible of the mischievous consequences which are likely to attend it. Sir, the morals of your people, the

peace of the country, the stability of the government, rest upon the maintenance of the independence of the judiciary. It is not of half the importance to England, that the judges should be independent of the crown, as it is with us, that they should be independent of the legislature. Am I asked, would you render the judges superior to the legislature? I answer, no, but co-ordinate. Would you render them independent of the legislature? I answer, yes, independent of every power on earth, while they behaved themselves well. The essential interests, the permanent welfare of society, require this independence. Not, sir, on account of the judge; that is a small consideration, but on account of those between whom he is to decide. You calculate on the weaknesses of human nature, and you suffer the judge to be dependent on one, lest he should be to those on whom he depends. Justice does not exist where partiality prevails. A dependent judge cannot be impartial. Independence therefore is essential to the purity of your judicial tribunals.

Let it be remembered, that no power is so sensibly felt with society, as that of the judiciary. The life and property of every man is liable to be in the hands of the judges. Is it not our great interest to place our judges upon such high ground, that no fear can intimidate, no hope can seduce them? The present measure humbles them in the dust, it prostrates them at the feet of faction, it renders them the tools of every dominant party. It is this effect which I deprecate, it is this consequence which I deeply deplore. What does reason, what does argument avail, when party spirit presides? Subject your bench to the influence of this spirit, and justice bids a final adieu to your tribunals. We are asked, sir, if the judges are to be independent of the people? The question presents a false and delusive view. We are all the people. We are, and as long as we enjoy our freedom, we shall be divided

into parties. The true question is, shall the judiciary be permanent, or fluctuate with the tide of public opinion? I beg, I implore gentlemen, to consider the magnitude and value of the principle which they are about to annihilate. If your judges are independent of political changes, they may have their preferences, but they will not enter into the spirit of party. But let their existence depend upon the support of the power of a certain set of men, and they cannot be impartial. Justice will be trodden under foot. Your courts will lose all public confidence and respect.

The judges will be supported by their partizans, who in their turn will expect impunity for the wrongs and violence they commit. The spirit of party will be inflamed to madness; and the moment is not far off, when this fair country is to be desolated by civil war.

Do not say, that you render the judges dependent only on the people. You make them dependent on your president. This is his measure. The same tide of public opinion which changes a president, will change the majorities of the branches of the legislature. The legislature will be the instrument of his ambition, and he will have the courts as the instruments of his vengeance. He uses the legislature to remove the judges, that he may appoint creatures of his own. In effect, the powers of the government will be concentrated in the hands of one man, who will dare to act with more boldness, because he will be sheltered from responsibility. The independence of the judiciary was the felicity of our constitution. It was this principle which was to curb the fury of party upon sudden changes. The first moments of power, gained by a struggle, are the most vindictive and intemperate. Raised above the storm, it was the judiciary which was to control the fiery zeal, and to quell the fierce passions of a victorious faction.

We are standing on the brink of the revolutionary torrent, which deluged in blood one of the fairest countries of Europe.

France had her national assembly; more numerous and equally popular with our own. She had her tribunals of justice and her juries. But the legislature and her courts were but the instruments of her destruction. Acts of proscription and sentences of banishment and death were passed in the cabinet of a tyrant.—Prostrate your judges at the feet of party, and you break down the mounds which defend you from this torrent. I am done. I should have thanked my God for greater power to resist a measure so destructive to the peace and happiness of the country. My feeble efforts can avail nothing. But it was my duty to make them. The meditated blow is mortal, and from the moment it is struck, we may bid a final adieu to the constitution.

SPEECH OF MR. RANDOLPH

ON THE JUDICIARY ESTABLISHMENT.

MR. CHAIRMAN,

I DO not rise for the purpose of assuming the gauntlet which has been so proudly thrown down by the Goliath of the adverse party:—not but that I believe, even my feeble powers, armed with the simple weapons of truth—a sling and a stone, are capable of prostrating on the floor that gigantic boaster, armed cap-a-pie as he is; but I am impelled by a desire to rescue from misrepresentation the arguments of my colleague (Mr. Giles), who is absent through indisposition. That absence is a subject of pecu-

liar regret to me, not only because I could have wished his vindication to devolve on abler hands, but because he has to-day lost the triumph which yesterday he could not have failed to enjoy, that of seeing his opponent reduced to the wretched expedient of perverting and mutilating his arguments, through inability to meet and answer them. This is the strongest proof that can be given of inadequacy to refute any position. I therefore leave to the gentleman all the triumph he can derive from a victory over his own arguments; but whilst I feel no disposition to disturb him in that enjoyment, I hope I shall be permitted to correct some of the mis-statements which have been made of my colleague's observations.

In the view I have taken of the conduct of our predecessors, in the chain of whose measures the law now proposed to be repealed formed an important link, the *funding* of the debt of the United States, and the *assumption of those of the individual states* were reprehended. An attempt is now made to construe this disapprobation into a design of violating the public faith. But I deny, sir, that one syllable has fallen from my colleague indicative of a right, or a disposition on his part, to withhold the payment of any public engagements. Against those destructive measures, it is true, my colleague did raise his voice. Against the fatal and absurd maxim, that a public debt is a public blessing he had indeed very earnestly protested; but never, sir, did a word escape his lips, because no such sentiment ever lurked in his heart, which could be construed into a declaration that the present legislature possessed the same power over the engagements of former legislatures which they possessed over ordinary laws; that of modifying or abrogating them with the same latitude of freedom which had been exercised in their establishment. Since the gentleman betrays such peculiar sensibility on the subject of the debt, I shall rely on his support, if a mea-

sure shall be brought forward for its final and rapid extinguishment: not by a sponge, but by a fair reimbursement of one hundred cents for every dollar due.

With equal ease could I demonstrate that on the other topics introduced by that gentleman—the Algerine depredations, the Indian wars, &c. the representation has been equally unfair. I shall not dwell upon them, because they are less calculated to make on the public mind the unfavourable impression that has been attempted on the subject of the debt. I will therefore dismiss them with this short and simple remark—The *uses* to which these incidents were applied, and not the *events* themselves, formed the subject of my colleague’s animadversions.

But to the long catalogue of unpopular acts which have deprived their authors of the public confidence, the gentleman tells us, he and his friends were “goaded” by the clamour of their opponents. He solemnly assures us, that in the adoption of these measures they clearly foresaw the downfall of their power; but impressed with a conviction that they were essential to the public good, and disdaining all considerations of a personal nature, they nobly sacrificed their political existence on the altar of the general welfare; and we are called upon now to revere in them the self-immolated victims at the shrine of patriotism. These are, indeed, lofty pretensions; and although I shall not *peremptorily* deny their sincerity, I may, in this age of infidelity, be permitted to doubt it; for I call upon the committee to decide whether, in this day’s discussion the gentleman has evinced that purity of heart, or that elevation of sentiment, which would justify me in clothing him with the attributes of Curtius or of the Decii.

In the wide range which the gentleman has taken, the question how far the common law of England is the law of the United States, in their confederate capacity, has

been brought forward. We are told "that the terms of the common law abounds in every page, and almost in every line of the constitution; that without it, that instrument would be unintelligible and inefficient—that, therefore, it *attaches* to the constitution. Moreover, that it is the law of the states, by the acknowledged principle, that colonists carry to their newly adopted country, so much of the law of the parent state, as is applicable to their new condition." That the common law is to settle the meaning of common law phrases, few will feel disposed to deny; that when the constitution uses the term "court," it does not mean "jury," and that by "jury," it is not intended to express "court," seems plain enough to any capacity. But because the common law is to be resorted to for an explanation of these and similar terms, does it follow that that indefinite and undefinable body of law is the *irrepealable* law of this land? The sense of a most important phrase, "*direct tax*," as used in the constitution, has been, it is believed, settled by the acceptance of Adam Smith; an acceptance, too, peculiar to himself. Does the Wealth of Nations, therefore, form a part of the constitution of the United States? Will gentlemen please to specify also, whether that common law which they have adopted for the United States, be the common law as it stood modified by statute in the reigns of Elizabeth and James the first, prior to the existence of the act of habeas corpus, divested of all the salutary provisions afterwards introduced at the revolution; or whether it be the common law of George the second? Whether we are to be governed by the common law of Sir Walter Raleigh and captain Smith; or that which was imported by governor Oglethorpe; or on which of the intermediate periods they have chosen as fixing the common law of these states?

I wish, especially, to know, whether the common law

of libels which *attaches* to this constitution, be the doctrine laid down by lord Mansfield, or that which has immortalized Mr Fox? And whether the jurisdiction thus usurped over the press, in defiance of an express emendatory clause, which must be construed to annul every previous provision, if any such there be, which comes within its purview, be an example adduced to illustrate the position, which I certainly shall never contest, that ‘ what the constitution does not permit to be done by direct means, cannot, constitutionally, be indirectly effected.’ But to reconcile us to this usurpation, we are informed, that the principles of the common law are favourable only to liberty; that they neither have been, nor can be enlisted in the cause of persecution. If I did not misunderstand the gentleman, he said, that no prosecutions had occurred under that law. He has therefore never heard of the case of Luther Baldwin. I speak of the New-Jersey case. Nor that of Williams. Other instances I learn from high authority have taken place in Vermont. I intreat the committee to pardon me for so long detaining them in listening to topics so irrelative to the main question, and afford me their attention, while I offer some reasons in favour of the expediency and constitutionality of the bill before them. I have not heard any arguments on this occasion more satisfactory to me than those urged at the time when the law was passed, in favour of the expediency of the measure. I have waited in the expectation, that gentlemen would endeavour to prove, that the former judges, under a different arrangement, would be inadequate to the duty of holding the circuit courts. A belief that every real objection to the former system might have been obviated by some modification of this kind, induced me to dissent to the passage of the law in the first instance. That dissent was recorded on the journals of the house—and so many members of the commit-

tee stood in the same predicament with me, that if a sense of duty to myself and the house were insufficient to deter me, that fact alone, of which the gentleman was himself a witness, ought to have repressed the aspersions which he has cast upon a great portion of the committee, whom he has represented as the mere puppets of executive influence, acting upon no convictions of their own, but played off by an invisible, although not unknown hand. Yes, sir, objections to this system are treated as if altogether unheard of until of late, although a very formidable minority have uniformly been found opposed to it. Nevertheless, this is altogether the work of the executive, who by the slightest expression of disapprobation could yet arrest the measure, and save the constitution. I am unhackneyed in the ways of majorities; my experience has been very limited; but am I to conclude from the observations which have passed, that it is the *common law*; the uniform practice heretofore of this government, for congress to be the mere instrument in effecting the executive will—a chamber for registering presidential edicts. It is said, that the document on this subject is one which the executive has no right to lay before the house. When did the right of the president to recommend modifications of the judiciary system cease? Such recommendations have heretofore formed a prominent feature in two successive executive communications, made at the commencement of two successive sessions of congress. Did the right of the executive to recommend, and of congress to act, cease at the precise period when the faultless model of the last session was perfected? The gentleman from Delaware has taken such a wide range, and thrown out such a vast deal of matter, that, in attempting to reply to some of his observations, I am necessarily led into many desultory remarks. The present system, it seems, was necessary from the inevitable corporeal infirmity of the judges: the

unavoidable effect of the tedious probation indispensable to that venerable station.

Let us compare the former practice with the present theory. The judge of one of the two districts into which Virginia had been divided, was contemporary with me at school. He is certainly neither an *infirm* nor a *hoary* sage. His associate from Maryland was an active and gallant partizan at the siege of Pensacola during our revolutionary war; not contending, however, under those banners where you would have expected to find a man, who occupies so dignified a station under the government of the United States; but fighting the battles of his king: bravely, yet alas! unsuccessfully contending against the spirit of insubordination and jacobinism, which threatens to sweep from the earth every thing valuable to man, and against which the gentleman from Delaware is also eager to enter the lists. Upon a subject connected with those appointments, we have been told that the executive had a right to presume a vacancy in all cases where a judge of an inferior tribunal had been appointed to a seat on the bench of a superior court; and that the new office vests, not at the time when the judge is notified of his promotion, nor at the date of his acceptance, but from the date of his commission. I certainly do not mean to contend with the gentleman from Delaware on points of law, yet I will put a question to him. It will readily be conceded, that the vacating of the former office is the condition of the acceptance of the latter. Suppose a judge after the date of his new commission, but prior to his notification or acceptance thereof, performs a judicial act. Is that act to be, therefore, invalid? Can his successor, on receipt of his commission, exercise the functions of judge, prior to the resignation of the former incumbent? Can any office be at the same time in the possession of two persons? Does not this doctrine imply a right on the

part of government to anticipate the resignation of any judge, and compel his assent to an act vacating his office. The new commission under these circumstances either did, or did not give a claim to its possessor in the office. If it did not, the executive had the right to withhold it. If it did, a judge may be expelled from office, without his consent, and provided at any time afterwards he shall acquiesce, the expulsion is legal.—Besides, by what authority does a member of this house hold his seat under an election previous to his appointment of district judge of North Carolina? For this office a commission was issued, as I am credibly informed. But, sir, we shall be told, that the manner in which this affair was transacted ought not to affect our decision. It is with me an irrefragable proof of the inexpediency of the law, and of course conclusive evidence of the expediency of its repeal.

But the constitution is said to forbid it. And here permit me to express my satisfaction, that gentlemen have agreed to construe the constitution by the rules of common sense. This mode is better adapted to the capacity of unprofessional men, and will preclude the gentleman from Delaware, from arrogating to himself and half a dozen other characters in this committee, the sole right of expounding that instrument, as he has done in the case of the law which is proposed to be repealed. Indeed as one of those who would be unwilling to devolve upon that gentleman the high priesthood of the constitution, and patiently to submit to technical expositions which I might not even comprehend, I am peculiarly pleased that we are invited to exercise our understandings, in the construction of this instrument. A precedent, said to be quite analogous, has been adduced: the decision of the judges of Virginia on a similar question. A pamphlet entitled 'a friend to the constitution' has been quoted. Public opinion informs me, that this is the production of

the pen of a gentleman who holds a pre-eminent station on the federal bench. Am I so to consider it? If this be understood, it is entitled to high respect; the *facts* at least must be unquestionable.

The courts of Virginia consisted of one general court of common law, a court of chancery, composed of three judges, and a court of admiralty. The judges of all those courts held their offices during good behaviour, and did, by law, constitute a court of appeals. The general court becoming manifestly incompetent to the extensive duties assigned to it, a system of circuit courts was adopted in 1787, and the judges of the court of appeals were appointed to ride the circuits. This law the judges pronounced unconstitutional, and agreed, unanimously, to remonstrate against it. After lamenting the necessity of deciding between the constitution and the law, and that in a case personally interesting to themselves, they said, "that on their view of the subject the following alternatives presented themselves; either to decide the question or to resign their offices. The latter would have been their choice if they could have considered those questions as affecting their individual interests only."—Yes, sir, and such was the character of those men, that none doubted the sincerity of their declaration. They then go on to declare, that the legislature have no right even to increase their duties, by a modification of the courts; a privilege for which no one here has contended. In respect much more, it is believed, to the characters of those venerable men, than to this opinion, the legislature did not enforce the new regulations. The law was new modelled, a separate court of appeals established, the judges of which were to be elected by joint ballot, in conformity with the constitution. New members were added to the general court, and it was declared to be their duty to ride the circuits. The judges of chancery, of the general court, and

court of admiralty, who had not been elected, in pursuance of the constitution, judges of appeals, but on whom that duty was imposed by law, were relieved from the further discharge of it. In this arrangement, several of the judges were understood to have been consulted; and on the ballot the six senior judges were elected, five into the court of appeal, and the sixth into the court of chancery. Nevertheless against this law the judges also protested, as an invasion of the judiciary establishment, denying the right of the legislature to deprive them of office, in any other mode than is pointed out in the constitution, I mean by impeachment; but to make way for the present salutary system, they do, in their mere free will, resign their appointments as judges of the court of appeals, and, *as they do not hold any separate commission for that office*, which might be returned, they order the same to be recorded.

Now, sir, I shall not contend, as I certainly might, and with great reason, that the *practice* of Virginia must be considered as settling the constitutional doctrine of that state, (the opinions of individuals, however enlightened and respectable, notwithstanding,) under which practice, two chancellors have been removed from their office of judges in chancery, as well as of appeals, and the judges of the general court and court of admiralty also, divested of their seats on the bench of the court of appeals, although a court of appeals was supposed necessary, and *was retained in the new system*; nor shall I insist on the disparity between the stability of the judicial branch of government in the eye of the constitution of Virginia, and that of the United States respectively, as surely I might. For the constitution of Virginia has a *retrospect* to *pre-existing judicial establishments*,—which experience had tested, which were allowed to be beneficial, and which it is contended were sanctioned by it. That of the United States,

formed when the confederacy had no such establishments, is altogether prospective in its operation. It looks forward to such establishments, as things *to be* created, from time to time: in other words, to be modified as experience should point out their defects. But, sir, I shall not dilate upon these forcible topics; I will concede, for argument's sake, that the doctrine contended for by the judges of Virginia was the true constitutional doctrine, and I will argue from it to the bill on your table, first applying it to the act on which it is intended to operate. Previous to the existence of that act, the duty of the judge of the circuit court was performed by the judges of the supreme court, who also constituted a court of appeals, and by the judges of the respective districts. These were judges of the circuit court to every intent and purpose, as completely as the judges of Virginia were judges of appeals. By the operation of the law of the last session, they have been divested of this *OFFICE* and other persons have been appointed to it. Much stress is laid, much ingenuity exercised, to raise metaphysical distinctions between the court and the office. I will grant, all that gentlemen contend for, that there is a wide distinction; but does that affect the case? Does it alter the fact? The late circuit courts were not only abolished, but the persons holding the office of judge of those courts no longer hold it; they have neither been impeached, nor have they resigned. They have not even accepted any new appointment inconsistent with it, and by which it became vacant. The function of judge of the circuit court does or does not constitute an office. If it does, then the judges of the supreme and district courts have been deprived of their offices; (the discharge of whose duties, be it remembered, constitutes no small part of the consideration for which they receive their salaries:) If it does not, then the circuit judges are not now about to be deprived of their offices. On the passage of

the law of the last session, did we hear any protest against its unconstitutionality from the supreme or district courts? Of any resignations of the office of judge of the circuit court, in order that a salutary system might take effect? And yet, sir, is not that office as distinct from that of supreme or district judge, as the office of judge of appeals in Virginia is from that of judge of the general court, chancery, or admiralty? Are not the jurisdictions of those courts separate and distinct? Neither of them having original jurisdiction of the same subjects; and an appeal lying from the inferior to the superior tribunal, as in Virginia, although the officers of those tribunals may be the same individuals. What then is the difference between taking the office of appellate jurisdiction from the judge who possessed original jurisdiction, or taking the office of original jurisdiction from the appellate judge? How is the independence of the judge more affected by the one act than by the other?

To prove the unconstitutionality of this bill then, by a recurrence to the doctrine of the judiciary of Virginia, is to prove the unconstitutionality of the law of which it will effect the repeal: And no arguments have been, or, in my opinion, can be adduced to prove the unconstitutionality of the one, which will not equally apply to the other. No, sir, gentlemen are precluded by their own act from assuming the ground of the judges of Virginia; they are obliged to concede that we have the power, because they have already exercised it, of *modifying* the courts, and are they not to concede the question? They tell you that this, however, in order to be constitutional must be a "bona fide" modification; but here the *onus probandi* lies upon them—It rests upon them to prove that this is a mala-fide modification.

Gentlemen have not, they cannot meet the distinction between removing the judge from office for the purpose

of putting in another person, and abolishing an office because it is useless or oppressive. Suppose the collectors of your taxes held their offices by the tenure of good behaviour, would the abolition of your taxes have been an infraction of that tenure; or would you be bound to retain them lest it should infringe a private right? If the repeal of the taxes would be an infringement of that tenure, and therefore unconstitutional, could you ring all the changes upon the several duties on stamps, carriages, stills, &c. and because you had retained the *man*, and any *one* of these offices, without dismissing his emoluments, abolish the others? Would not this be to impair the tenure of the office which was abolished, or to which another officer might have been appointed by a new regulation? Have not the judges in the same manner been deprived of one of their offices, and is not the tenure as completely impaired thereby as if the office had been taken away also? Although it will be granted that the *tenant* is not much affected, since with one office he has the salary formerly attached to both.

I agree that the constitution is a limited grant of power, and that none of its general phrases are to be construed into an extension of that grant. I am free to declare, that if the extent of this bill is to get rid of the judges, it is a perversion of your power to a base purpose; it is an unconstitutional act. If on the contrary it aims at the displacing one set of men from whom you differ in political opinion, with a view to introduce others, but for the general good, by abolishing useless offices, it is a constitutional act. The *quo animo* determines the nature of this act, as it determines the innocence or guilt of other acts. But we are told that this is to declare the judiciary, which the constitution has attempted to fortify against the other branches of government, dependent on the will of the legislature, whose discretion alone is to limit their en-

croachments. Whilst I contend that the legislature possesses this discretion, I am sensible of the delicacy with which it is to be used. It is like the power of impeachment, or of declaring war, to be exercised under a high responsibility. But the power is denied—for say they, its exercise will enable flagitious men to overturn the judiciary, in order to put their creatures into office, and to wreak their vengeance on those who have become obnoxious by their merit; and yet, the gentleman expressly says, that arguments drawn from a supposition of extreme political depravity prove nothing; that every government pre-supposes a certain degree of honesty in its rulers, and that to argue from extreme cases is totally inadmissible. Nevertheless the whole of his argument is founded on the supposition of a total want of principle in the legislature and executive. In other words, arguments drawn from this hypothesis are irresistible when urged in favour of that gentleman's opinion; but when they militate against him, they are totally inapplicable. It is said that the bill on your table cannot, constitutionally, be passed, because unprincipled men will pervert the power to the basest purposes; that, hereafter, we may expect a revolution on the bench of justice, on every change of party;—and the politics of the litigants, not the merits of the case, are to govern their decisions. The judiciary is declared to be the guardian of the constitution against infraction, and the protection of the citizens as well against legislative as executive oppression. Hence the necessity of an equal independence of both. For it is declared to be an absurdity, that we should possess the power of controlling a department of government which has the right of checking us; since, thereby, that check may be either impaired or annihilated. This is a new doctrine of check and balance, according to which the constitution has unwisely given to an infant legislature the power of impeaching

their guardians, the judges. Apply this theory to the reciprocal control of the two branches of the legislature over each other and the executive, and of the executive over them. Sir, this law, says the gentleman, can not be passed, because the character of the bench is to be given to it by the legislature, to the entire prostration of its independence and impartiality. It will be conceded, that measures, such as have been pourtrayed, will never be taken, unless the sentiment of the ruling party is ready to support them. Although gentlemen contend that the office of judge cannot be abolished, they are not hardy enough to deny that it may be created. Where then, sir, is the check, supposing such a state of things as the gentleman has imagined, (and which he has also declared cannot be conceived) which shall prevent unprincipled men from effecting the same object by increasing the number of judges, so as to over rule, by their creatures, the decisions of your courts? Would not public opinion be as ready to sanction the one as the other of these detestable acts? Would not the same evil which has excited such apprehension in the minds of gentlemen be thus effected by means even more injurious than those which they have specified? Without any breach of the constitution an unprincipled faction may effect the end which is so much apprehended from the measure now contemplated to be adopted. I might add, that when the public sentiment becomes thus corrupt, the ties of any constitution will be found too feeble to control the vengeful ambition of a triumphant faction. The rejection of this bill does not secure the point which has furnished matter for so much declamation. Its friends are represented as grasping at power not devolved upon them by the constitution, which, hereafter, is to be made the instrument of destroying every judicial office, for the purpose of reviving them and filling the places with their partizans. I

have long been in the habit of attending to the arguments of the gentleman from Delaware, and I have generally found in their converse a ready touchstone, the test of which they are rarely calculated to withstand. If you are precluded from passing this law, lest depraved men make it a precedent to destroy the independence of your judiciary, do you not concede that a desperate faction, finding themselves about to be dismissed from the confidence of their country, may pervert the power of erecting courts, to provide, to any extent, for their adherents and themselves? And that, however flagrant that abuse of power, it is remediless and must be submitted to. Will not the history of all governments warrant the assertion, that the creation of new and unnecessary offices, as a provision for political partizans, is an evil more to be dreaded than the abolition of useless ones? Is not an abuse of power more to be dreaded from those who have lost the public confidence, than from those whose interest it will be to cultivate and retain it? And does not the doctrine of our opponents prove that at every change of administration the number of your judges are probably to be doubled? Does it not involve the absurdity that, in spite of all constitutional prohibitions, congress may exercise the power of creating an indefinite number of placemen, who are to be maintained through life, at the expense of the community? But when these cases are cited, you are gravely told that they suppose a degree of political depravity which puts an end to all argument. Here, sir, permit me to state an important difference of opinion between the two sides of this house. We are accused of an ambitious usurpation of power—of a design to destroy a great department of government, because it thwarts our views, and of a lawless thirst of self-aggrandizement which no consideration can restrain. Let us not be amused by *words*. Let us attend to *facts*; for *facts* will show who

are contending for unlimited, and who for limited authority. The opponents of this bill contend that they did possess the power of creating offices to an indefinite amount, which, when created, were beyond the control of the succeeding legislature. They of course contend for the existence of such a power in the present legislature, for whose exercise there is no security but their self-respect. In other words, that if the present majority should incur the suspicion of the people, they may, as soon as there is any indication of their having forfeited the public confidence, on the signal of their dismissal from their present stations, make ample and irrevocable provision for themselves and their adherents, by the creation of an adequate number of judicial offices. Now, sir, this is a power which we reject, although it is insisted that we possess it. We deny that such an authority does exist in us. We assert that we are not clothed with the tremendous power of erecting, in defiance of the whole spirit and express letter of the constitution, a vast judicial aristocracy over the heads of our fellow-citizens, on whose labour it is to prey. Who then are, in reality, the advocates of a limited authority, and who are the champions of a dangerous and uncontrollable power? In my estimation the wisest prayer which ever was composed, is that which deprecates the being led into temptation. I have no wish to be exposed myself, nor to see my friends exposed to the dangerous allurements which the adverse doctrine holds out. Do gentlemen themselves think that the persons whom I see around me ought to be trusted with such powers? Figure to yourselves a set of men whose incapacity or want of principle have brought on them the odium of their country, receiving in the month of December, the solemn warning that on the fourth of March following, they are to be dismissed from the helm of government—establish the doctrine now contended for,

and what may you not expect? Yes, sir, the doctrine advanced by our opponents is that of usurpation and ambition. It denies the existence of *one power* by establishing another, infinitely more dangerous—and this you are told is to protect, through the organ of an independent judiciary, the vanquished party from the persecution of their antagonists, although it has been shown that by increasing the number of judges any tone whatever may be given to the bench.

The theory for which gentlemen contend seems to me far-fetched and overstrained. A mighty enginery is set in motion, which to all good purposes is ineffectual although formidable in the perpetration of mischief. If however the people should be of a different opinion, I trust that at the next election they will apply the constitutional corrective. That is the true check, every other check is at variance with the principle that a free people are capable of self-government.

But, sir, if you pass the law, the judges are to put their veto upon it, by declaring it unconstitutional. Here is a new power of a dangerous and uncontrollable nature contended for. The decision of a constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people, or to those who are irresponsible; for the responsibility by impeachment is little else than a name. From whom is a corrupt decision most to be feared? To me it appears that the power which has the right of passing judgment, without appeal, on the validity of your laws is your sovereign: but an extreme case is put; a bill of attainder is passed: are the judges to support the constitution or the law? Shall they obey God or mammon? Yet you cannot argue from such cases. But, sir, are we not as deeply interested in the true exposition of the constitution as the judges can be? With all deference to their talents, is not congress as capable of forming

a correct opinion as they are? Are not its members acting under a responsibility to public opinion, which can and will check their aberrations from duty. Let a case, not an imaginary one, be stated. Congress violate the constitution by fettering the press; the judicial corrective is applied to; so far from protecting the liberty of the citizen, or the letter of the constitution, you find them outdoing the legislature in zeal; pressing the common law of England into the service, where the sedition law did not apply.—Suppose your reliance had been altogether on this broken staff and not on the elective principle. Your press might have been enchained till doomsday, your citizens incarcerated for life, and where is your remedy? But if the construction of the constitution is left with us, there are no longer limits to our power, and this would be true if an appeal did not lie, through the elections, from us to the nation—to whom alone, and not to a few privileged individuals, it belongs to decide in the last resort, on the constitution.—Gentlemen tell us, that our *doctrine* will carry the people to the gallows, if they suffer themselves to be misled into the belief, that the judges are not the expositors of the constitution. Their *practice* has carried the people to infamous punishment, to fine and imprisonment, and had they affixed the penalty of death to their unconstitutional laws, judges would not have been wanting to conduct them to the gibbet.

A case in the supreme court has been mentioned. I certainly do not mean to put my opinion in competition with that of the gentleman from Delaware, on a professional subject; but I cannot agree with him, that the granting of the rule was not an assumption of the jurisdiction. Suppose a motion made in a court of Virginia, for a rule to be served on the governor of Massachusetts, to show cause why a mandamus should not issue, commanding him to do a specific act. To my unlettered judg-

ment the acceptance of the motion would be to presume that, if the governor should not show cause, the mandamus might issue. Would not any court reject such a motion on the consideration, that the chief magistrate of another state was not amenable to their jurisdiction? The gentleman from Delaware doubtless recollects, and probably better than I do, for I believe he was a spectator of the trial, the refusal of a subpoena to a man under a criminal prosecution (I allude to the case of Cooper in Philadelphia) to be served on the president as a witness on the part of the prisoner. Was that a subject of inferior magnitude to a mere question of municipal regulation? The court, which it seems has lately become the guardian of the feeble and oppressed against the strong arm of power, found itself then destitute of all authority to issue the writ. Was it because of the influence and interest of that persecuted man, or of his connexions, that it was unnecessary at that time to exert this protecting power? No, sir, you may invade the press; the courts will support you, will outstrip you in zeal to further this great object: your citizens may be imprisoned, and amerced; the courts will take care to see it executed: The helpless foreigner may, contrary to the express letter of your constitution, be deprived of compulsory process for obtaining witnesses in his defence; the courts in their extreme humility cannot find authority for granting it; but touch one cent of *their salaries*, abolish one sinecure office which the judges hold, and they are immediately arrayed against the laws, as the champions of the constitution. Lay your hands on the liberties of the people; they are torpid; utterly insensible: but affect their peculiar interest and they are all nerve. They are said to be harmless unaspiring men. Their humble pretensions extend only to a complete exemption from legislative control; to the exercise of an inquisitorial authority over the cabinet of the executive,

and the veto of the Roman tribunate upon all our laws; together with the establishing any body of foreign laws which they may choose to declare a part of the constitution. Grant this authority, sir, to your judges, and you will have a constitution, which gentlemen who are such enemies to dumb legislation may indeed approve, because it is the very reverse of that which has been the object of their animadversions. To you will indeed belong the right of *discussing*; but there ends your power; the judges are to *decide*, and without appeal. In their inquisitorial capacity, the supreme court, relieved from the tedious labour of investigating judicial points, by the law of the last session, may direct the executive by mandamus in what mode it is their pleasure that he should execute his functions. They will also have more leisure to attend to the legislature, and forestall by inflammatory pamphlets their decision on all important questions; whilst for the amusement of the public we shall retain the right of debating, but not of voting.

A new mode of appeal, that of the sword, has been lately introduced. It is worthy of remark, that the æra of this appeal commenced with the downfall of the power of the last administration. The political opponents of that gentleman have set him an example of which I hope he and his friends will profit. They knew that the constitution had been violated. It was no business of speculation, but a plain matter of fact. What was their conduct? They preferred submission to civil dissention. They addressed themselves to the good sense of the community, and their judgment has been affirmed by the people through the medium of the elections.

But, sir, another objection is held up, as fatal to the bill on your table: that it diminishes the salaries of the district judges of Kentucky and Tennessee, by repealing the law which increased them. Let us examine this fact.

By this very law, the courts of those districts were expressly abolished, the office of judge of those courts was destroyed. The men it is true, were retained and a judicial office given them—but an office entirely different from the former, with distinct functions and jurisdiction, and with different salary. We propose to restore those judges to their old offices by abolishing the new ones, to which they never were constitutionally appointed. If their appointment, however, was constitutional, I leave it to the committee to decide whether the district judge of Kentucky might not, on the theory of our adversaries, demand both salaries—since you had no right to take away his old office and salary. I have not the pleasure of a personal acquaintance with the gentleman who fills that office; but his reputation is too high to lead me to suppose such a claim possible. I mean no disrespect to him, far from it, in putting this case. Instead, as has been asserted, of rendering the office of judge a sinecure as a pretext for abolishing it, we propose to restore the establishment to its primitive purity: to give the judges both of the district and supreme courts duties to perform—the latter being, it seems, now destitute of any other employment than keeping the consciences of the inferior courts—we mean to restore the district judges to their office of which they have been deprived—not believing a sinecure court of appeals to be desirable. Whence then the clamour that the judicial authority is to be perverted to the vile purpose of wreaking party vengeance. Suppose a case to occur—are not the persons who are to decide of the same political character with the minority? Would that gentleman have any cause to fear the decision of a controversy with a person of a different political complexion because of that difference? Is not the judiciary left precisely in the state in which it was a twelvemonth ago? Are not the same principles to govern, and the same individuals to

decide? It is not, however, on account of the paltry expense of the new establishment that I wish to put it down. No, sir, it is to give the death blow to the pretension of rendering the judiciary an hospital for *decayed* politicians; to prevent the state courts from being engulfed by those of the union; to destroy the monstrous ambition of arrogating to this house the right of evading all the prohibitions of the constitution and holding the nation at bay.

If gentlemen dread the act which we are about to pass, they will remember that they have been the means of compelling us to it. They ought to have had the forbearance to abstain from such a measure at such a crisis. They have forced upon us the execution of a painful duty by their own want of prudence. If they wished the judges, like the tribe of Levi, to have been set apart from other men for the sacred purposes of justice, they should have pondered well before they gave to publicans and sinners the privilege of the high priesthood. It is said that there is irrefragable proof in the smallness of the salaries annexed to them, that those offices were not established under any improper bias. If such bias had existed, 10,000 dollars, or a larger sum, might have been given. To execute a proposition of this sort, votes I believe never would have been found wanting. On that, as on another occasion which has been mentioned, we should have had *blank votes*. This is however triumphantly brought forward as an instance of the want of power in one legislature over the acts of another. The president's salary might have been increased, or that of the judges, to a million or more of dollars; where would be your remedy? I will tell gentlemen; in a refusal of an appropriation. Who would hesitate in such a case? The salary might exceed the annual revenue. This too, is another instance I suppose of the inadmissibility of extreme cases. I should not hesitate, sir, to refuse an appropriation in

such a case, and throw myself on the good sense of my country.

The example of a mighty nation has been held up as a solemn warning against an act which is said to prostrate the barriers of the constitution; to that example be the decision of this question referred. A government entrenched beyond the reach of public opinion, had for ages been accumulating one abuse upon another; against an authority which time served but to render more intolerable, the nation was compelled to seek refuge in a recurrence to revolutionary principles. And are we, therefore, to sanction a construction of the constitution which claims irresponsibility for public agents? Which allows no remedy for grievances but revolution, and that perhaps when a recurrence to such a measure shall be too late. Who, after such an example, ought to contend for a perversion to individual aggrandizement of that power which was delegated for the general good.

I have endeavoured, Mr. Chairman, in my poor desultory way, to repel some of the arguments which have been offered by the gentleman from Delaware. Upon some topics it has been extremely painful to me to dilate; they could not have been avoided; they were obtruded upon me. There is one however, on which it may be expected I should say something. I believe it unnecessary; the poison carries with it its own antidote. We should have expected such remarks from *that* gentleman. If, however, he is now anxious to protect the independence of this and the other house of congress against executive influence, regardless of his motives, I pledge myself to support any measure which he may bring forward for that purpose; and I believe I may venture to pledge every one of my friends.

SPEECH OF MR. WICKHAM,

ON THE TRIAL OF AARON BURR, LATE VICE-PRESIDENT OF THE
UNITED STATES, FOR HIGH TREASON.

THE trial of Mr. BURR ON THE CHARGE OF TREASON, had been carried on with little interruption for three months, when it appearing that there was no possibility of legally establishing the charge, or, whatever the prisoner's intentions might have been, of proving a manifest overt-act against him, a motion was made on his behalf to exclude farther evidences on the trial for treason.—The question was of the utmost importance, and was argued in a manner worthy of it—to adopt the words of Chief Justice Marshall on the occasion,—“A degree of eloquence seldom displayed on any occasion, embellished a solidity of argument and a depth of research by which the court was greatly aided in forming the opinion it was to deliver.” The motion succeeded, and the consequence was a verdict of NOT GUILTY.

In support of the motion, the following speech was made by Mr. Wickham.

MAY IT PLEASE YOUR HONOURS:

If this were an ordinary case, that were likely to be terminated within the period, or ten times the period, that is commonly occupied in making a decision, we should not now have attempted to make an interruption: but it is obviously not so, when we take a view of 130 or 140 witnesses, which the prosecution has announced their design to bring forward, (and the defendant has about 20 to produce in his behalf,) and when we see the number of counsel employed on each side. From these

considerations, upon the common mode of calculation, we must anticipate that it will take up weeks, if not months, before we shall be permitted to see a close to this (already) tedious enquiry: nay, sir, you cannot have a well grounded hope offered you, that, at this inclement and sickly season of the year, it will ever be terminated.

But there is enough already discovered in the case, to satisfy you that, prove what they will besides, the prosecutor must fail in his aim, beyond the possibility of a doubt. He has no alternative: there is enough to show this jury, from the statement of the gentleman himself, that it is impossible for him, in any way within his power, to obtain the conviction of Col. Burr; and the idea of his proceeding is absurd, and can have no other effect than an immense and useless waste of time, and a long imprisonment of the jury to the great possible injury of their healths. He ought at once (himself) on these grounds, to go forward, and agree to close the cause.

It is admitted by the attorney, sir, *that Col. Burr was not present, nor within the district, when the overt act charged was stated to have been committed.* I proceed upon this position, which I understand to be admitted in fact.

Mr. Hay. I only stated that we are not prepared to prove that he was present.

Mr. Wickham. If it shall not be proven that he was present, sir, I contend that under the constitution and laws of the United States; under the law of England; under the invariable usages of all courts, it is impossible to maintain such a presentment as that of levying war against the United States. It must, inevitably, be proved that the person was actually present to levy the war, in person, before it can be denominated an *overt act* of levying war. I know that there are *dicta* of a different description in some few English authorities, but I shall be able in its

place to establish undeniable proof of its inapplicability at the time and place. It is a duty that I owe, not only to my client, but to every citizen in this community, because every individual is interested in it: it is a duty that I owe to posterity, and which, if it were only for their sake, I never would flinch from executing.

The first ground I shall take up to prove this position is the constitution of the United States. I never will give my tacit assent to so dangerous a doctrine as to admit that, under the constitution of our country, any man can *possibly* commit treason against the country except he be *actually* present *in person* to do the act. On that point alone, though there are many others, I flatter myself to be able to prove to your honours that the present case is not sustainable.

Art. 3. sect. 3. constitution United States, reads, that "Treason against the United States shall consist only in *levying war* against them; or in adhering to their enemies, giving them aid and comfort," &c.

In discussing this question, my client will pardon me if I say that I feel a great deal of pleasure in stating that it is not his case alone that I am now arguing, under this position: but it is the case of *every man* that breathes in this community: that I refer not to the good or bad deeds of Col. Burr—he may be as bad a man as the counsel on the other side think that he is: or he may be as good as his counsel contend that he is. It is an abstract principle that I contend for, relating not to any particular man, but to all men; and it will be a governing principle, as long as the United States shall continue a people, with the same habits and liberties. If our constitution shall even "vanish, and leave not a wreck behind," yet this will be a governing doctrine, that cannot change.

The words of the constitution are plain, and no person can be convicted for treason under it unless he *actually*

levies war against the United States. There is no necessity of resorting to any artificial rules of construction whatever, to understand the meaning of these words: it is obvious. But, if we are to construe it by any artificial rules, where are they to be drawn from? Why, sir, from the common law of England, and the rules of courts there, connected as they are with absurdities. They have put a construction upon their statutes on treason; and their courts have been governed by it, but *their* constructions, on *their* statutes, are not applicable here, because our constitution, which originally declared what treason should be in this country, is different from a statute that was made to alter or improve the common law, which before existed, as in England. Our constitution is a new, and original compact, made between the people of the United States for their mutual government; and has no reference to rules of any particular arts or science, to jurisprudence, or any such thing; but it is formed upon the sound principles of reason and moral rights, which are of superior dignity to a statute.

If, therefore, these words, according to their natural meaning, will bear the construction I contend for; and the constitution is superior to any statutory provisions; it is not necessary to argue farther on this point, unless the words themselves lead to absurdity. The words themselves, were introduced to prevent any arbitrary construction, or any dangerous doctrine, which sound reason and propriety imperiously forbid the genius of our government to permit: and even though they may be supposed to lean to the side of humanity, yet it is a true maxim, that it is better for ninety-nine guilty persons to escape punishment than that one innocent man should suffer under an arbitrary and wrong construction of law. Thus, every argument, drawn from reason and principles of right, is in our favour. But, if the counsel on the other

side will rely upon this arbitrary principle in their reasoning, I shall contend, that their construction is not warranted, either on the principles of English law, or upon our constitution.

Upon the English law, Lord Coke (who had no bowels of human kindness) is the first and principal to support the artificial and arbitrary constructions, and his doctrines are contradicted and opposed by many writers, since that time, who are deservedly venerated for their talents and humanity. The principle declared by him, and which must be contended for in this case, is, that all are principals in treason, and that there is no such character as an accessory; and thus those who, in any degree, participated in it, are included in its guilt by relation. The rule therefore is a borrowed one, and drawn from the worst of times. Now what is an accessory to a fact. It must be either an aider or abettor before, or at the fact; or a receiver after the fact. But the writers in England have not settled the doctrine that all are principals in treason: it is an abstract proposition of some of the writers, and has not been acted on, except in the case of Sir Nicholas Throgmorton, if that can so be denominated; and we are not to shape our decisions on a principle not tested even in England. That case is reported in 1 State Trials, p. 63. I will not read it, because your honour can refer to a faithful copy (in abstract) of it in Tucker's Blackstone, vol. 4, p. 44, appendix. In that case the charges are various—levying war and compassing the king's death; so that the prosecutor had his chance of convicting the prisoner under some or other. I have looked into all the cases respecting aiders or accessories before the fact, and discover no one to vindicate the doctrine that a person can be a principal in treason or in felony unless he was present; and I presume the doctrine cannot be supported. The case of Mary Speak, in Tremain's Pleas, p. 3, is the only

case where the aider or accessory of a treason, before the fact, has been ever brought to trial. She was charged with aiding or assisting the duke of Monmouth in sending provisions: she was not an accessory in the fact, but before, or during the fact. This lady was tried in the time of James II. before the celebrated but infamous Jeffries, and whether even *he* carried this doctrine through or not, it is impossible to say, but certainly no one except him did: and I presume that no decision of *Jeffries* would be called up as a precedent in our time and country.

The other great branch of treason within the English statutes, is *compassing the king's death*. We all know that this crime is supposed to strike at the existence of the government, and therefore in that country it is considered as a heinous offence, and we also know that it is a species of crime which may consist in intention. The agreement or the determination to do the act makes the crime, although no blow be struck. Now, it is impossible that there can be aiders and abettors in that crime, because every person concerned in the intention is a principal. It is unlike levying war, because it cannot be imagined that an intention or agreement to levy war is levying of war: they only become traitors, by relation, when the war is actually levied.

I admit, however, that there are to be found in the English books, convictions of a number of persons, who were accessories *after* the fact; and it may be contended upon a parity of reasoning, that cases of receivers after the fact apply directly to the same point. I must admit the correctness of the position, if it is made. But it is proper, when we advert to these decisions, to enquire *at what time*, and *under what circumstances* they were passed. Lady Lysle's, Kernly's and Eliz. Grant's as cases, in 4 State Trials, pages 106, 141, and 142, and also Burton's case, relate to accessories after the fact. [Mr. W. here read an

extract from Hume's history of England, vol. 8, chap. 7, p. 233, in which the cruelties, perpetrated by Col. Kirk, &c. are depicted, with Mr. Hume's inference.] 'These declarations and these cases are precedents. They can find no other.

But, sir, since the revolution of 1688, the decisions of the English courts have led to conclusions directly otherwise: the most numerous cases of treason since that period have been decided by judges of a different stamp, and who are entitled to the highest respect. The decisions upon the rebels of 1745 demand our most strict attention and respect: the battles of Culloden and of Preston Pans; and the late duke of Cumberland's victories over the rebels, are not yet forgotten; nor are the decisions of lord Mansfield or Sir John Strange: and yet, in the whole of the legal adjudications of that period, we do not find one instance where a person who harboured a traitor was convicted of treason; nor are decisions to be found where the counsellors or advisers of traitors are considered as principals in the fact of treason. The pretender's escape is accurately described, and though it was known who had assisted and harboured him in his escape, there is not an authority of a single prosecution in that case for harbouring, counselling or advising. But, let us not draw inferences from the silence or inactivity of the officers of the crown or of the court, but let us advert to the principles upon which the courts saw fit to act. The fact of the pretender having raised an army to dethrone the king, (George II.) was notorious; that the rebels marched from Scotland into England, and gave battle after battle, is as well known as the existence of the island itself. There was no difficulty in proving the fact: every body knew it; but the only difficulty (and all that was to be proved to criminate any man) was, that *he* was there, and engaged in the rebellion. This was a situation in which every man

became a party, because the rebellion was a general one, and the pretender had marched into the very heart of England. Now, if the government had determined to point out any as victims, what had they to do but to prove that the person had committed the crime of treason in a certain county; or if they could not prove that, to prove that the pretender had marched into that county; and that the person charged, had some kind of connexion with him in the rebellion; and then, according to the doctrine of the gentleman, the person must suffer! But is it so in reality? No, sir. It was necessary that the prosecutor should bring home the overt act of levying war to the person charged; and to prove that he had committed the crime in the county where it was charged.

This doctrine is laid down in Foster's Crown Law, p. 3 to 6, and at the foot of page 6, is a remark particularly emphatical; it was laid as the cases respectively required. Now, according to the doctrine contended for, on the other side, what did they require? Why, prove that the rebellion existed, (whether in England or in Scotland,) and prove that there was some sort of a connexion between the person charged, and the general rebellion, and then he would be guilty? But this was not the case, sir; the connexion with the rebellion and the actual engagement in it, *at a certain place*, were two things, agreeable to the doctrine of justice Foster. See Fost. p. 9, and 9 St. Tr. 558. The facts were not committed by *Deacon*, in Cumberland, "where the venue of the overt acts was laid," and, it was the opinion of the judges that "some overt act laid, be proved on the prisoner in *Cumberland*; but that being done, acts of treason, tending to prove the overt acts laid, though done in a foreign country, may be given in evidence." M'Nally, p. 505. Again. Foster, p. 22. Sir J. Wedderburn's case, the doctrine is strengthened. The overt act was laid in Aberdeen, and it was

proved that he was there: having proved that, they were at liberty to go elsewhere for additional proof. But the doctrine our opponents would contend for, would not require it to be proved that he was in Aberdeen. And, upon that doctrine, surely, lord Mansfield and other counsel of high celebrity would be novices in having admitted of the doctrine of actual presence. The case of lord Balmarino, in 9 St. Tr. 605, who was charged with having marched into and occupied the city of Carlisle, is of the same nature. It was clear that he was not there on the day that the city was taken, but that he marched in with his troops afterwards. Now, according to their doctrine, lord Mansfield would have said there was no difficulty in the case, because whether the prisoner was there or not, would not have mattered, since the army was there, and he was connected with that army.

[Some conversation here occurred between the court and the counsel on both sides on the case referred to, in which Mr. W. contended that the English law writers were uniformly of opinion that the party charged must have been present at the treason, or the indictment could not be sustained, except supported by the dangerous doctrine of constructive treason, which he could not imagine would be contended for. He mentioned lord Coke, Stanford and lord Hale, who had successively copied each other, the history of which opinions was well reported in judge Tucker's Blackstone, appendix to vol. 4, note ‡, pages 41 to 47, and plainly shows how error has been begotten, and is sustained by error. The decisions and *dicta* of the ancient law writers, lord Coke and others, prove that their theory and their practice was at variance. They were all fond of a particular quaintness of expression, and their opinions were regarded as law. Thus, among others, lord Coke declared that, in the highest, or the lowest offences, there was no such thing as accessories, but that

all were principals. Now if this rule were to be applied to some offences (assault and battery for instance) it would degenerate into palpable absurdity in practice. For instance: A is offended with B, but he does not choose to risk his own person in obtaining the satisfaction of a chastisement, but employs a bravo to do it for him: but how can an action be brought against the procurer? Certainly no one can become a principal in the trespass upon the person of a man, except he who does the act of trespass, and the *act* of trespass is not perpetrated by advising or instigating another to do it. Hawkins's pleas, ch. 29, sect. 4, p. 440. No man, sir, can be a principal, in an assault, except he be personally present, nor can he be charged with aiding in an assault. Thus, if a man in one county, procure a person in a different county, to make an assault upon another, there can no action for assault lie against the procurer. And this is the practice of the English courts, whatever the *dicta* of writers might have been.]

Mr. Hay. I certainly have stated that no person who shall procure one man to beat another can be called a principal in the assault.

Mr. Wickham. Well, sir: if the doctrine and practice of the English courts were exactly as the gentleman says, and admitting that constructive treasons were constantly punished in England; and that any man connected with rebels was to be declared guilty of rebellion; yet, I shall contend, that it cannot be applied under our constitution or laws. It is well known that the statute 25 Edward III. is the foundation of all the indictments for treason in that country, but, that that statute did not create the doctrine of treason, or make that crime such, which was not such before, but that it was intended rather to narrow than enlarge the rules of common law, 1 Hale's Pleas of the Crown, ch. 11, p. 75. 87; and Hume's Hist. of England.

Before that period, it was a common law crime, but under our constitution there is no common law, as belonging to the United States. I know not whether it is necessary or not to prove this position, because I do not know but the counsel for the United States hold the same doctrine. I repeat that, as to crimes and offences against the United States, there is no common law of the United States as such, but that the courts are governed by the common law of the state where such court sits. Thus the rules of this court are governed by a common law, not because it is a common law of the country at large, but the common law of Virginia: and so it applied in the states respectively. Thus, any crime punishable by the constitution of the United States, or by act of congress, must necessarily be taken out of any common law jurisdiction, because it is made uniform in all the states. If, therefore, a treason was to be tried in a state where there is no common law (if such were) yet the case would be precisely the same, because the rule is general, and makes the offence the same. As the United States therefore has no common law, treason could not become an offence, but by the constitution, or by statute. But, sir, even though made a crime by the constitution, it could not have become punishable but by statute, for the constitution must have lain dormant until the law, establishing courts, commonly called the judiciary act, was passed. 3 Dallas, Warrel's case. Mr. W. also instanced the sedition law, and some of the cases tried under it.

Now, sir, as there is no common law belonging to the United States, no act of congress can refer, or be attached to it more than is the constitution; and hence, it is necessary to enact statutes in order to define the punishment for crimes. In England, felonies, &c. are offences punishable at common law, and the rule is, that "statutes made in affirmance of common law, or to supply the defects of

common law, are to be construed according to the rules of common law." 10 St. Tr. 436, M'Daniel's case; and Hobart 98. If an offence is declared to be felony by statute, that moment the common law acceptation is applied to it and the accessories as well as the principals are subjected thereto, and punishable by the common law principles. It is of no consequence, therefore, whether the statute mentions accessories or not; they are punishable under the common law. Now, piracy was not considered as a crime at common law; 1 Hawkin's Pleas, ch. 37, p. 152. But a statute made it punishable with death, and it was then declared felony, and thus the aiders and abettors were involved, as in all other cases of felony.

Now, sir, if we examine the cases by analogy, we must consider that we have no common law here, and, consequently, no case being subjected to common law doctrines and usages, leaves all crimes in the same situation as piracy was in Great Britain, so that there can be no aiders or abettors in it. Crimes which are not under common law, but which are punishable by statute, where accessories are not mentioned, those accessories cannot be punished. The gentleman might therefore have his choice: he must either admit of the existence of the English doctrine of common law and *constructive* treasons here; or he must admit of its non-existence, and to our statutory provision, which excludes the common law of the several states, because treason in one state is the same in every other. Such was the opinion of that congress who enacted the law for the punishment of treason.

I come now, may it please your honours, to consider what construction the act of congress will bear. The act of April 30, 1790, Grayd. Digest, p. 61, defines treason in the same words as the constitution did: and it is doubtless that the framers of that case took it for granted that that part of the constitution remained a dead letter until the time

the act was passed. But, neither in the constitution, nor in the act of congress, is a single word said about accessories in treason, although aiders, abettors, assistants, procurers and advisers in cases of murder, robbery, piracies, &c. are mentioned; and punishments enacted for them, if connected either before or after the fact; or if harbouring persons after full conviction, guilty of such crimes, or setting a traitor at liberty, after his conviction. See the 6. 10. 11. 12. and 16 sections of the judiciary act. Now, certainly, if the rule of abettors, &c. in treason, as used in England, had been thought necessary, or intended to have been adopted by statute in this country, why was it not inserted in this act, where there is a specification in what manner abettors, &c. in other high crimes shall be punished. Now, surely aiders and abettors in *treason* would have been taken in as *particeps criminis* (if it had been intended by the legislature) as well as in other crimes: and this idea is strengthened by referring to the 23d section, where rescue is spoken of—"if any person or persons, shall, by force, set at liberty, or rescue, any person who shall be found guilty of *treason, murder, or any other capital crime, &c.*—he shall suffer death." It is also enacted that if a rescue is made of persons imprisoned on suspicion of being guilty of any of the aforesaid crimes, fine and imprisonment shall be imposed.

Now, sir, according to the gentleman's doctrine, *all* are principals in treason, whether procurers, or receivers—*before* or *after* the fact; and there is no distinction. This is absurd, because there is a manifest distinction in the law between the punishment of those who receive or harbour a traitor after conviction, and one before: the one being punished with death, and the other fined in five hundred dollars and imprisoned one year;—what must necessarily be the inference from this correct view of the statute on the subject? Why, sir, that congress had no idea

that aiders and abettors in treason were comprehended within the constitutional definition; and that was the reason why they did not mention aiders and abettors in that crime, whilst they did mention them in *murder, robbery, piracy, &c.* I hold it to be a sound rule of law, that the naming of a punishment for a crime in one instance, or of one species, and not naming it in another, excludes that which is not named from the same punishment or nature, or, more properly, that the expression of the one, is an exclusion of the other. But even the construction of the English laws do not include aiders and abettors in treason as principals, except when they were declared to be such, and it is a palpable misapplication of terms to fix that construction upon them.

To prove these positions, Mr. W. quoted 1 Hale's Pleas, 6. 1, ch. 24. p. 258, and p. 275: St. 25 Ed. III; 1 Mary; 26 Hen. VIII. 3 ch. and 27 Hen. VIII. ch. 2. where aiders and abettors are mentioned; but where they were not, there must be a conclusion that they were not meant.

But, sir, the framers of our constitution did not intend to leave the instrument to construction, or to suffer future legislatures to enlarge treason—their object was to perpetuate to posterity a well defined instrument—one that could not be mistaken in its sense; and so the framers of the judiciary law understood it: they knew that it was not formed merely to keep the several states in union, but also to perpetuate the liberty of the people, that posterity should not be subject to constructive laws. Why is a republican institution granted to us in that instrument? Is it not, sir, for the public good, and for the protection of the liberties of the people? and that is only to be effected by such an established form of government as will secure to us the advantages intended to be conveyed. The best means to perpetuate that liberty is to guard against constructions; and those gentlemen mistake the means for the end who

attempt at the form, while they neglect every thing like the substance. In ages of despotism, whenever a person was marked out as a victim, it could always be effected by a charge of treason; and a conviction was sure to follow: this, sir, our convention and our legislators knew, that even a republican government might not be proof against the evil, except it was particularly guarded: they knew that if a majority of the people could be set in array against any individual, unless he had some legal or constitutional ground to defend himself by, it was in vain for him to depend upon sympathy, and he would be undone, however worthy and virtuous. To evince this, we need only look back to the sanguinary time of Robespierre, when public sympathy appeared to be annihilated.

When I speak of sanguinary times or blood-thirsty men, I wish not to be understood as having any particular reference to any gentleman or case, but mention it merely in an abstract sense. But the danger of this arbitrary power was known to the people of the United States, and knowing this, they anticipated a provision: (I hope in God those times are not now arrived and never may be in this country) they established the principle that no man should be punished for treason except he had actually levied war against the United States, or adhered to the enemies thereof. Now admit of the doctrine of constructive treasons, and this principle will be extinguished, but the plain and perspicuous language of our constitution removes the case beyond all possible doubt, and it can admit of no possible change. Our convention had the volume of human nature unrolled before them—the spirit of human liberty was known, was understood, was felt by them; they knew that perjury might be enlisted against any individual; they knew that innumerable things might be brought as charges against a man; and therefore they said that treason should “consist only in levying war against them, or in

adhering to their enemies, giving them aid and comfort." No person shall be convicted of treason unless on the testimony of two witnesses, &c. Thus, as was observed by my friend Mr. Lee the other day, there must be *an open deed* of war committed. Take away this, sir, and you open the door immediately to constructive treason! and what has a government to do, if it determines to make a sacrifice of any devoted individual? (I argue on the abstract principle.) An insurrection might take place in New Hampshire, but there is a man in Georgia, and who has never been out of the state, is charged with having connexion with it, (perhaps he is a back-woods man, going out with his gun a hunting, or there might be some assemblage of men, for some innocent, or unknown purpose;) what have the government to do, in order to implicate this man with the insurrection? It is known that the insurrection has existed and therefore it is an overt act; they prove that certain persons have committed treason, or have been guilty of insurrection, and perhaps it can be proved by fifty persons, but the connexion of this man with it is unknown in Georgia; however, being charged there with a connexion, he is carried away to New Hampshire: a jury is impannelled by the marshal of the court, who is an officer elected by the government, and who is removable at pleasure, or whenever he shall displease them: what is to be done? The prosecutor proves the insurrection, and then brings one or two witnesses (one perhaps might be enough) to swear that the person accused was connected with it; thus, he is convicted of levying war against the United States, in connexion with people he never saw, and at a place where he never was in his life. But, it may be argued here, that any man is liable to a false accusation:—this is true: but where is he to be tried? Is he to be tried where the prosecutor pleases! The prosecutor says that he was connected with the treason, but he says, he can prove that he never was upon the spot.

But it seems that proof would not avail him in this crime, which is contrary to all others, if the gentleman's doctrine is right: where is the constitution during all this time? What safeguard is this to an individual? He must conclude it to be no safeguard to him, but that he was convicted for a treason of which he knew nothing, in a place where he never was, and with people whom he never knew, or saw. If, sir, the constitution means no more than the gentleman pretends, of what avail is it to us, or what would it be to such a man? It means nothing.

But say the gentlemen, if this be the case, a conspiracy to levy war means nothing, and will not be punished at all. Be it so, sir. If the constitution did not see fit to trust the government with it, be it so. But, say they, are not conspiracies to levy war punished in England? I answer that they are, but what means conspiracy to levy a war there? Why all the cases are a conspiracy to kill the king, and there is no other, but that of regicides. Hume's history of England, 2d vol. p. 487, speaking of the statute of Edward III. acknowledges this to be the fact, and even the ingenuity of the lawyers of this day are not able to prove that a conspiracy to levy war, is war levied, or that it ever meant any more than a conspiracy against the life of the king: which I cannot presume will be applied in any American case.

Again. Gentlemen may argue that their indictment will support them. But, sir, they indict us for *doing* the act, and not for *conceiving* it. And, whatever the form of their indictment might be, it cannot operate in a court of law in superiority to the constitution and laws, which know nothing of aiders, abettors, procurers or receivers in treason. Therefore we shall contend, that the constitution and laws of the United States, and not the English construction attached to them, must be the guide, whatsoever indictment might have been presented.

But, sir, it will be said that the decision of the supreme court in this country is directly against us. Let the opinion of the supreme court speak for itself, and we fear not to depend upon that decision even. If this opinion is to be considered as conclusive authority, then the court are bound to support the principle which shall be advanced: but if they do, they must support every *obiter dictum* whatever, that any court shall establish, and particularly the supreme court. But I never will admit that a judicial body can become legislators, and *make* laws; but I will admit of the doctrine that the gentleman advanced the other day on the subject of "extra judicial" opinions. This decision I take to be of the same authority as though the judges had decided a point in their chambers, when there was no case at issue before them. Now if there was a case of a person before them who had *levied war* against the United States, surely there would have been the arguments of counsel on that case; but, I will appeal to gentlemen present, who were there, whether that point was ever touched by any gentleman of the bar, or whether it was not a mere *dicta* of the court without a point being in dispute. That a point of law not being involved in, but attached to a case, is not to be considered in the way of a decision, I will appeal to all authoritative opinions. I have frequently heard Chancellor Pendleton say, that such decisions were not to be considered as authority, *because the point did not turn upon the opinion; and because the point was not argued*, and made without sufficient consideration: it was merely stated *arguendo*.

Sir, I will take an instance of this mere *dicta*, as a practicable illustration, as furnished by the court in the insurrection in Pennsylvania. We all know, that there, aiders, abettors, and procurers were not sought for. I will not mention names, because they are, perhaps deservedly, kept out of view. But those who were the movers, we know, were never punished, nor ever indicted, whilst the actors,

and those only—those poor men who were found in it, and not those who set it on foot, were punished, or tried.

I must here, sir, indulge the feelings of my own mind and declare that it is not merely the case of my client that I consider it necessary to take up so much of your honour's time about; while I feel for the safety of my client, I must express my feelings for all the citizens of the United States, and for posterity. Yes, sir, I feel for my children and for my country, because the safety of *all* our posterity, and our fellow citizens, is concerned. There is no safety, and our government is a mere tyranny, if they are to have the power of doing what they please in a court of justice. I see, I feel for the danger to which my posterity will be exposed; and it is upon this ground, and this only, that I have indulged and shall continue to indulge those feelings which the case appears to demand. My client, sir, has other grounds; upon which I believe I shall be enabled to prove to this court, that it is impossible for the attorney to succeed in this prosecution.

I have now, may it please the court, gone through the point which I contended for, not as it related to my client, but upon the abstract principle. My argument was not intended to refer to the government, nor to any part of it: as a government I respect it, and trust that I ever shall: it is to the principle alone, I referred, and not with any relation to persons or political principles.

I will now go on to say that, even admitting the constitution to be different from what I suppose it to be, this charge of treason cannot be supported by the present indictment. I take it to be a fact, that the evidence *must* support the indictment; and therefore I contend that the prosecutor must prove the facts as laid in the indictment. And that it being admitted that Mr. Burr was not present at the time or place laid in the indictment, they *must* fail in their prosecution. That conspiring to levy war is all

that they can prove; but for the *acts* of others, under our constitution and laws, no man can be punished; and that proving the fact to exist merely, can be no proof against any individual, without those facts can be brought home to him. This is not founded upon arbitrary principles, but upon the imprescribable laws of right, let the crime charged be what it may. The indictment, let the charge be for what it may, should identify, minutely, the crime charged, and that nicety should be strictly conformed to by the court; but our objection to this indictment does not relate to that critical nicety, but to a flagrant inconsistency. It may have been a subject of objection that we did not make this motion sooner, but it was impossible that we could until we had the opportunity to see the indictment. It was impossible that we could know the facts that the prosecutor had intended to prove: he did not know but it was intended to be proved that he was at Blannerhasset's island where the indictment is laid. But knowing that he was not there, he came, perfectly satisfied that nothing but perjury could produce a conviction, since he knew that no person could levy war against the government without he was personally present. How could he expect to be charged through third persons to commit this crime. Now the wording of this indictment is so specific as to charge Col. Burr with having committed this treason at Blannerhasset's island, where he is acknowledged not to have been; and "with divers persons unknown;" and yet now it is charged that he was known to be connected with Mr. Blannerhasset, Mr. Smith and Mr. Tyler!

It will be objected that, if he is or is not guilty, he must know it, and therefore it is of no importance whether there is a specification in the indictment or not. Why, sir, were this doctrine true, it would prove too much; it would be even saying that there was no occasion for an indict-

ment at all? Now, I think it might be possible that a man might commit an act, and not know it at all, according to this mode of reasoning. I really believe that Col. Burr knew nothing of these men being at Blannerhasset's island; but at any rate it has not been proved that he knew any thing of their being there. Now, sir, how is he to be informed of these things? Is it to be by rumour and public clamour; or is it to be by a specification in the indictment itself? I presume the latter, but even that does not declare that he is to be tried for being connected with others who had levied war at that place, but that he, together with certain other persons unknown, did commit treason at a certain place (where he was not) by levying war, (when, in fact, no war was levied.)

But, sir, there is another and an important defect in this indictment; the proper wording of an indictment for treason in levying war should have the word "*public*" *war* inserted; but, on the contrary, the indictment does not even pretend to specify that this was a *public* war. The words are, that he did "ordain, prepare and levy war," &c. So that the act might have been perfectly private. (To be sure the gentleman does not pretend to prove that it was public, since Mr. Blannerhasset's groom, nor any other person who was present, knew any thing about a war, or warlike appearance in the persons who were at the island.) But that it is necessary to insert the words "*public* war" in the indictment, I refer to precedents, 8 St. Tr. 219; 9 St. Tr. 543; Tremain's Pleas; and Fries's Trial, 17: in all of which, and in every other case, that word is inserted as a part of the charge. In every correct indictment, the prosecutor must not only charge the levying war, and the particular overt act, but that it is *public* and *known*, or else it is no war at all. Perhaps the attorney might not have known what was in the indictment; perhaps he might have entrusted it to

his clerks by setting a book of precedents before them. If not so, was it done to make it soft to the grand jury, that they should not be excited to enquire what *public war* had been committed. I will not, however, presume to say that it was omitted by design: it might have been by accident. But, sir, where is Col. Burr to go, to enquire, what public war had been committed in which he could be involved, so as to produce a charge of treason? There could be no ground upon which he could conjecture it. In short, he had no right to conjecture, but to have had it specified, agreeable to perpetual precedent, for what charge he was indicted.—These observations are made to show that there is no ground to *presume* that we had any knowledge of the act that is supposed to have been committed.

I come now to enquire into the nature of precedents in relation to *specification* in indictments. I know of no cases where *special* indictment could be dispensed with, except that of Sir N. Throgmorton, in the time of Mary I. recited in 1 St. Tr. 73, and cases under judge Jeffries, of which we can find nothing certain; or if certain, they surely could not be called up as precedents at this period, nor in this country. Somerville's case in Anderson's Reports, p. 186, called for an argument upon this point, wherein it was finally settled, after great consideration, that the form ought to be special in the indictment, where there was a conspiracy to do any act of treason. This indictment was for conspiring to kill the king.

Mr. W. here read 1 Hale's Pleas, p. 280, and referred to the act of Henry VIII. to prove that there could be no such a thing as a person committing treasons of the descriptions there recited without a personal presence, and concluded that it was as physically impossible for Mr. Burr to have committed this treason at Blannerhasset's island, he not being personally present, but in Kentucky

at the time. That it was an immutable rule of nature, that one body could not be in two places at the same moment; and it was admitted by the prosecution that the accused was in Kentucky at the moment of this alleged treason in Wood county, Virginia. The overt act may or may not constitute the treason, but of that, the circumstances stated in the indictment ought to show; and the evidence produced upon that indictment ought to be conformable. For instance: a person indicted in England might be for "rebellion." Now he might have been concerned in the rebellion of 1715, and likewise in that of 1745: he might have been tried and acquitted of that in 1715, or he might have been only in that of 1745. Now, surely, for the sake of giving him warning of what he would have to meet, it is necessary to specify the particular act or acts which are charged; but lay as many overt acts as you will in the indictment, it is but one war; and the overt acts are mentioned by way of specification of that war, let the number be what they may; and the evidence upon that specification is offered to prove the war. So in cases recited of treason by conspiring the death of the king, you charge the conspiracy, and, in order that the party should know how to form his defence, you state the overt acts. But, sir, if there are twenty overt acts laid, there can be no reason, from that, that he should be tried twenty times over, because it all must point to the same treason.

But, in any event, no man is to be made responsible for the acts of others; or if he is, he ought at least to be told that he was concerned in the acts of others. They charge Col. Burr with levying war with *persons unknown*. Now, sir, we are charged with acting with those *unknown* persons by relation, and when we were not there. This is contrary to common reason and propriety. English precedents in indictments are directly contrary to this: be-

cause, when persons were connected with others, those others are always named. See 1 Tremaine's Pleas, 279—Gerrard's case; James Duke of Monmouth's case, Hambden's case, 307, ib. 2 vol. do. 281. Hewit's case; Mordaunt's case, 291 ib. 4 St. Tr. 132, Cornishe's case. These all conformed to the rule of law, that where the charge was laid, all the correspondent circumstances should be received, or, otherwise, no proof of those circumstances should be adduced. What case can it be conceived to be more necessary to make a specific charge in than in the present? But, on the contrary, we are only charged with others, by relation; and yet, they tell us that those others were *unknown*! But, they may say that we know them now. How can we know them? I beg the court to observe to what a latitude such a doctrine might be carried. An act of treason might be committed several times at one spot—say Blannerhasset's island—not a private war, like this, but a public war: Now, could Col. Burr tell which of these acts of war he was meant to be charged with, or with whom he was supposed to be connected, by such an indictment as this? He cannot be prepared to answer, when he knows not what will be put to his charge. Gentlemen might say this is an extravagant supposition, but it is not so, if viewed in a proper light. Suppose instead of the spot being on Blannerhasset's island, it was an English case, and charged in *London*, where these things frequently happen, and half a dozen riots might have happened in a short period, say a year: suppose an indictment to be brought against a person for committing a treason with "persons unknown:" now how is it possible that the person charged should know to which of those acts the evidence was intended to be brought, or how is he to meet the charge by counter testimony? I submit, therefore, that no evidence of the acts of third persons to charge him with levying war can be

received, when it is admitted that he was not present at the war, but was stated to be present by agency; and that this indictment cannot be sustained.

But this argument has another bearing. Once establish it as a principle, that a special indictment is necessary: that you are obliged to charge the matter specially; and are not left at large to a general indictment "that you did levy war," and then the argument of the constitutionality applies at once, because you fall exactly within the rule of receivers after the fact; and are not made liable, since only acts can be construed to come within our doctrine of treason. The indictment, even in England, must be special, although accessorial treasons exist: how much more so then is it necessary to have a special indictment in this country? I will venture to declare that without it, no indictment can, on any account, be sustained.

Ch. Justice. But may not the levying of war, generally, be charged; and then the overt acts be specifically charged?

Mr. Burr. It is admitted, sir, that I might be charged generally in that sense, if I had been at the spot: but this brings us to the constitutional question. We contend that it is out of the pale of the constitution; and if so, there must be a demurrer, even had it been specified that such a war had existed, and that I was at another place, at the time.

Mr. Wickham. It is admitted that such a charge would be necessary, even in England, but it is more necessary here. Now, sir, if it is proved that a special indictment is necessary, then no indictment can be good that is not special.

There is another inference to be drawn from this argument: that if it is specially laid, it must be laid to have been committed at the place where the act was done: not

the act of levying war itself, but that which makes the person a traitor by relation: the act of *relation* should be laid where the assent, or procurement took place. If a person is guilty, it must be done by the person himself, and at some certain place or places.

It may be objected that all are principals in treason, and therefore he may be supposed to be present by relation, as a participant in the act. This doctrine would prove too much: it would prove that accessories after the crime, being principals, must be tried where the crime charged was not committed; this is contrary to the genius of our law, and therefore is inadmissible. Lady Lisle's case may perhaps be termed a precedent, but we have no objection to the gentleman taking the benefit of it. If the treason is proved, and that doctrine be contended for, it is incumbent on them to admit of another fact, to wit: that one body can be in two places at the same identical time. See 4 Hume's Hist. Eng. 388. Lady Lisle's prosecution, and for which she was executed by order of judge Jeffries, was for "harbouring and concealing a Mr. Hicks, a Presbyterian minister, of the duke of Monmouth's party, though he was not attainted; and his name was not in the proclamation—and he was one who was a stranger to her." Sir Nicholas Throgmorton's case is for aiding and assisting in Wyatt's rebellion, in 1544, 1 Mary, before Bromley, C. J. K. B. 1 St. Tr. 68, &c. The war was levied in Surrey, and he was marching for London, but before he got to Temple Bar, (the entrance to the city) his followers all quitted him, and he was taken. He was tried at Guild Hall, in Middlesex. This, to be sure is of the same nature as the present: the war was commenced in Kent or Surrey, and he was taken in Middlesex. But can gentlemen—will they presume to build a doctrine upon such data, where such men as Coke, Bromley or Jeffries preside; and in such days as those of

Mary and Charles II.? This argument would prove that precedents brought from any time, and actions done any where, might be received as precedents? It is clear, sir, that the rules laid down in the English books are in direct opposition to such a doctrine. Now, at common law, if a felony was committed in one county by A, and B was an accessory to it, in another, B could not be tried at all, 1 Hale's P. C. ch. 57, p. 623. It is not pretended however that an act could not attach in such a case, if it can be found, and therefore, if it is punishable at all, our constitution and laws must point it out, since common law can have no operation. Herty's Digest 59. art. 8. amend. const. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state *and district wherein the crime shall have been committed,*" &c. Now, according to this unerring rule, if Col. Burr had committed an offence, where was he to be tried, but where he advised or assented—if any where? Now, this doctrine was not meant to be an illusory thing, or a mere set of words, but an essential doctrine. And therefore a citizen of Georgia, for a crime charged in Georgia, cannot be tried in New-Hampshire, nor any where else, but in the district of Georgia.

But, sir, if all these points are against us, (which I cannot even apprehend) there is one in reserve, upon which we cannot fail; and had the case been of less importance, had I not felt it my duty to state what I have, I should have thought it fully sufficient to all the purposes of this case, to have placed a full reliance on *this point*, and this only.

It is this: that if aiders, procurers or abettors of treason are punishable at all, yet their guilt is *derivative*; and can only be established by legal proof of guilt; and there is no legal proof of guilt short of this: that the *principals* are guilty; and that a *record of their conviction* be produced

in court. And then, only, their connexion with the convicted person will come in.

I should not have brought forward this point, and it was far from the wish of my client to have mentioned it, but from his being charged as an accessory, in the indictment. It would have been an act of justice due, not only to him, but to the gentlemen who are also charged, to have withheld this point, had they not been indicted, and had not the attorney taken the course which he has thought proper to pursue. In point of propriety, therefore, they ought to have been first tried. Messrs. Blannerhasset, Smith and Tyler, (who are respected, and very deservedly) who are charged as having been present at the scene and time laid in the indictment of Col. Burr, are not held up to the United States by the peculiar epithets of "arch traitors." It has, to be sure, been held up to the public, that they should be punished; but they would have assuredly been more disposed to prosecute them with activity, if they had believed that their conviction would have produced the conviction of Col. Burr. These gentlemen therefore owe not their safety to the tenderness of the prosecution. But, sir, though I do not attribute their safety to any such a source, yet, I am supported by law to say that except there be a record of the conviction of some person who was a principal, in the treason, it is impossible to proceed in the trial of Col. Burr, who is charged as an aider and assister only, or to produce any evidence against him.

If I am right here, sir, the case is at an end. This is the rule in all felonies, of whatever nature. Receivers, aiders, or accessories, of whatever description, cannot be tried (and it is so in treason) until after the principal shall be found guilty, and a record be produced of his conviction. But gentlemen will urge that this doctrine does not apply to treason, because there are no accessories in trea-

son, but that all are principals before the fact. The rule is general, and applies to accessories, as well those after, as those before the fact. [Mr. W. in supporting his position, referred to 4 St. Tr. 130 and 137, and to the acts on that subject, of Wm. III.] But whatever accessories it might apply to, it was always necessary to show the conviction of the principal, to support the accessorial guilt. Lady Lisle was convicted, attainted and executed, but the principal had been tried and convicted; but, this being a lady of fortune and family, in the reign of king William, there was a reversal of the attainder.

Now, as aiders and abettors after the fact are as much principals as those before the fact, the same rule applies with equal force; and therefore the guilt of the accused in both instances, make a consequential crime in accessories; but that guilt must first be proved. For certainly if the crime never was committed, there never can be accessories to a crime. 1 Lord Hale 613, is an authority upon the true mode of reasoning on this point: for those certainly who committed treason in the first degree ought to be tried before those who are charged in the second degree, else it might be possible that the man who is charged as second, might be convicted, whilst he who is charged in the first degree might be acquitted. Now place this doctrine to the present case: Col. Burr is charged with treason as the aider and abettor of Mr. Blannerhasset, &c. Mr. Blannerhasset is not tried, and it is uncertain whether he will be convicted when he shall be tried (if ever) and therefore Mr. Burr, who is charged as an accessory, might be convicted, whilst the principal might be acquitted. The attorney ought therefore to prove, and he must prove, first, that the act was done, before he can be let in to give any evidence whatever as to who was concerned with it, especially as to the persons charged in the second degree. 1 Anderson's Reports, 109. 2 Hale

223. So, referring to Somerville's case, where the principal was first tried, and then the accessory, Lord Hale thinks it a regular course, in indictments, first to state *specially* that the person was an accessory, for nothing can be got by the prosecutor in not stating it, since whether the accused was a *receiver* after, or an *aider* before the fact, he cannot be guilty, if the principal is innocent. Therefore, to prove that Col. Burr was guilty, you must first prove, conclusively, that Mr. Blannerhasset was guilty. But, sir, this objection meets the case at its threshold; and you cannot proceed farther but by producing the conviction of the parties who were present, or those who were present at the time of the treason charged. See Foster, 341 to 346. Now, justice Foster contends, that, in every derivation of treason, there should be evidence of the conviction of the principal. It will be observed that he goes at large into the question; and that all the exceptions which are made, relate to compassing the king's death, in which there can be no accessories, because all are principals. 1 East, 100. I do not, however, pretend to quote East as an authority, generally; but, because his doctrine on this subject is well supported. There is some little inaccuracy in him, which Hale or Foster would have avoided.

As to all being *principals* in treason;—we know that in the treason of compassing the king's death, all are principals; but there are other treasons in the English rule; if one advise or encourage another to do the act, he would be a principal in that species of treason—but, if the other should forbear to commit that act, he would be innocent. This, as the authority states, “depends entirely upon the question whether the person (the principal person) has, or not, been guilty of the treason”—which, can only be legal evidence by his (the principal's) conviction.

We come here, sir, to defend ourselves against the in-

dictment, which is supposed to inform us what is against us; and to what charges we have to answer. We rely upon legal evidence in the case; and we ought to fear no other. Anderson, 109, in reference to Somerville's case, is express upon the subject; and there the *procurers* could not be convicted. This turns upon the very point, and the ground of decision in this case will prove to your honours that the ground we have taken is correct, as to specification.

There is one writer, however, who, in general terms, has stated it to be somewhat otherwise. Leech's Hawkins, 2 vol. ch. 29. sect. 2. p. 440, in the note. He lays down the *general* rule that, in *treason*, all are principals. But, however, this is happily characterized only to respect the death of the king: which, consequently, cannot refer to treason in this country. Whether we refer to Foster, Hale, Hawkins, East, or any other writer, we shall find that the *agency* can only be established by proof of the guilt of the principal, in his conviction. And the authorities all agree in this point, supported as it is by reason and by justice: and it is beyond all possible doubt, because the authorities declare uniformly in our favour. If it be answered that there is no adjudged case that is applicable to our argument, we reply that we are at least upon equal terms with our adversaries, and if there are any, they all apply to receivers and aiders after the fact, which are not applicable to treason in this country.

I have gone through all the points, sir, that I consider necessarily attached to this subject. There is another point however, which on account of its immense importance, not particularly respecting this case, but all others of this nature that may come before a court. It is, that before any evidence can be given—(even admitting every one of these points to be against us) towards the connexion or participation of Col. Burr in the treason said

to have been committed, the overt act of treason itself must be proved. And of that the court must judge. Upon this ground we fear not to meet the testimony: admitting all that has been said: even admitting the declarations of that unhappy wretch who was brought here to give testimony respecting the transactions on Blannerhasset's island, who was so ignorant that he could not even name the month when he was there; and who was so unprincipled as to declare, at one time, that arms was levelled at Gen. Tupper, when no one who was present besides knew of such a thing, and when himself even had differently related it. Admitting his testimony, even, to the fullest extent, and that (if the gentlemen please) it proves an act of war, yet this is a solitary witness, and the act and constitution require that there should be two witnesses to produce a conviction in cases of treason. But if all of it is believed, we seriously declare that no part of the transaction bore the least semblance of war. Why, sir, there really was a smile on the countenance of every gentleman, except the prosecutor, when they found what slender evidence he had to depend upon to support the charge of levying public war, or any war at all.

Here Mr. Wickham, enlarged upon the nature of *derivative* guilt, and insisted that before there was derivative guilt committed, there must necessarily be a conviction of the principal: but here there had not been an attempt to bring forward the guilt of Mr. Blannerhasset, who, to prove Mr. Burr guilty, must at least have been tried first. He quoted 2 Hawkins's Pleas, 440. ch. 29. sect. 2.; Foster, 364. 5.; 2 Hawkins, ch. 29. sect. 47, in the note.

He next proceeded upon the point last recited, which, if all the facts were proved, must militate against the prosecution. Now, sir, continued he, let us suppose that no evidence whatever could be produced against Mr. Blannerhasset, to prove his guilt, how then can any evidence

produce the conviction of Mr. Burr, whose guilt, according to this indictment, must depend upon the guilt of the other. What, sir, has been proved? a friendly meeting of a few adventurers, in a land speculation, on Blannerhasset's island! Nothing that was done there, had the least appearance of war, by any testimony that has been given, or that is pretended: for it has no bearing whatever on the charge. What can evidence of persons being in possession of arms amount to? Now, all the arms that we hear any thing about are a few rifles; and a few "shot guns," or fowling pieces. These are not necessarily military weapons—muskets and bayonets are.

Now, sir, let us take a view of the nature of the country. The inhabitants are almost in the continual practice of killing game, and every man has his rifle or his fowling piece. This is no more extraordinary, or evidence of evil design, than would be the possession of a knife or a sword. Consequently, a number of persons meeting together, for such a purpose as these men were proved to be, having such articles with them, cannot, for that, be called a warlike assembly. If in England a number of men with arms of any kind were to be found together, it would be thought extraordinary; and would excite suspicion, because it is not customary for people to carry guns; but the possession of pistols, either here or there, would not create any suspicions. These circumstances are no more evidence of a military assemblage to subvert the government by force, than if the people had not been there at all: and it proves nothing in relation to the case. What, then, is to be the rule? Why, sir, there must be evidence of a *treasonable* assemblage. For it might be proved to the court that, in point of fact, it is an *honest* assemblage.

It will be said, on the other side, that if the court undertake to judge upon these facts, they will invade the

province of the jury. But it is not the jury alone who are to judge of the facts. The court may direct the jury in criminal, as well as in civil cases, to find a special verdict. The facts must be applied to the case; and the court, as well as the jury, have a right to find on the facts. The weight of evidence must undoubtedly be decided by the jury; but of its relevancy, it is the province of the court to decide.

A number of cases have been quoted in another branch of this case to prove the fact above adduced. See Deacon's case, 20 Geo. II. and Wedderburne's case. The facts must first be proved, and "that being done, acts of treason tending to prove the overt acts laid, though done in a foreign country, may be given in evidence." M'Nally, 505. 9 St. Tr. 558. Fost. 9. But who is to decide upon this, the jury? No, sir, but the court; and it must necessarily be the court. So it is in civil cases: A. employed B. to make a contract for him. Here is an agency. Now if a suit commences that respects the agent, the agency must first be proved before the principal is bound to the bargain. But who is to judge of this proof? Why certainly the court: after that the party is let in with his evidence. This principle is farther illustrated by the right of a party to require a special verdict: and also by his right to demur to evidence, which is possessed by every one. Now if a juror is withdrawn, and the case commenced *de novo*, or a special verdict is to be given, who is to judge of the facts which shall lead to such a result? Certainly the court. This, sir, is sound law.

I come, now, may it please your honours, to inquire—and it is a most important inquiry indeed; not only as respects this case, but, as it may affect the public at large, and our posterity—what properly constitutes the crime of levying war?

Ch. Justice. Before you go into this point, I will ask

if you know of any cases in addition to those mentioned before, respecting the necessity of first proving the overt act?

Mr. Wickham. I consider Deacon's and Wedderburne's cases amply illustrative of the principle: and there are a number of other cases which I presume will be quoted to support the doctrine. The State Trials, when the cases are recited at large, will sufficiently prove the doctrine; and also that the court is to decide upon the nature of the evidence. I do not say that the court is bound to go into the full evidence; but there must be some evidence given, on the fact, such, as if legally true, might be sufficient to support a demurrer.

But what is the overt act, of levying war?

Mr. W. here referred to Mr. Hay's observations upon these terms.

Mr. Hay explained, and recited his argument upon the point; which he said was founded on the opinion of the Supreme Court. He trusted that the gentleman would not catch up a part of his argument without taking up the whole. On the question of where is the point at which an overt act of treason does exist—he would answer that it was where there was an assemblage of men collected together to accomplish a treasonable act by force, which it is their intention to complete, by force, before they separate. This answer was furnished by the Supreme Court. Now, the force which was meant to be employed by this assemblage, I take it for granted was intended to accomplish the object they had in view before they separated; and upon this the prosecution is grounded. I do not mean to say that they intended to accomplish their object before they quitted the place where they were collected: it is clear that their first meeting was only an assemblage for conspiracy; but the crime of treason was attached to their conduct by their continuance in the act,

province of the jury. But it is not the jury alone who are to judge of the facts. The court may direct the jury in criminal, as well as in civil cases, to find a special verdict. The facts must be applied to the case; and the court, as well as the jury, have a right to find on the facts. The weight of evidence must undoubtedly be decided by the jury; but of its relevancy, it is the province of the court to decide.

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I come, now, may it please your honour, to inquire—and it is a most important inquiry, not only as respects this case, but, as it may affect the public at large, and our posterity—what proper motives justify the course of levying war?

Ch. Justice. Before you go to that point, I

if you know of any cases in addition to those mentioned before, respecting the necessity of first proving the overt act?

Mr. Wickham. I consider *Duncan's* and *Waller's* and *Burne's* cases amply illustrating of the principle, and there are a number of other cases which I presume will be quoted to support the doctrine. The *Waller* case, when the cases are viewed in aggregate, will undoubtedly give the doctrine and show that the law is to be applied upon the nature of the conspiracy. I do not say that the law is bound to go into the full details of the case, and to make evidence given in the last case as I apply it, might be sufficient to support a conviction.

But what is the issue in it, if I may say so?

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which it was not their design to relinquish until they had completed the purpose for which they had assembled.

Mr. Wirt. I suppose the counsel on the part of the defendant have the right to object to the production of any piece of evidence which they may think proper to disapprove of. If they came here to make questions, they have the right to propound any propositions touching that evidence. But, sir, I suppose the court have also the right to prevent them from confounding distinct propositions, so as to make a mixture in the debate of points which do not belong to it. On the other day the counsel for the defendant rose to propound this question to the court—that there being no evidence of the presence of Aaron Burr on Blannerhasset's island, we not being able to produce any further proof of his guilt, he ought to be discharged. This day he opens with a totally distinct proposition; to wit: that the overt act, which we say is proved, is no overt act at all: and therefore that we ought not to go on with our corroborative evidence. I hope these questions will be separated.

Ch. Justice. When there are distinct propositions, the court will decide them; but when there is a distinction in the argument only, how can the court separate them? Now, if I understand the course of the argument advanced, it is continued under four different heads, or reasons: first, that Mr. Burr not being present, he cannot be charged with the treason: 2dly, that under this indictment he cannot be tried, because it is stated to be deficient for specified reasons: 3dly, that the guilt being of a derivative nature, the principal ought first to be convicted; or that a proof of his conviction ought to be in court before the accessory can be tried. And now he is, 4thly, about to require it to be proven that the act charged was “an overt act of levying war against the United States;” and therefore inquires what is levying war. He

says before any testimony can be let in to connect him with that crime, it is necessary to prove that there was an overt act of war, which he denies to exist.

Mr. Wickham. I really am very unfortunate in not satisfying the gentleman (Mr. Hay). I correctly quoted his observations, but what is his answer? Why, that his definition is the definition of the Supreme Court! [Here Mr. W. read a part of the opinion of the Supreme Court.] Upon this he relies: but he is not held out in his doctrine even from this authority.

I will now proceed, sir, to examine his positions; he relies upon the decision of the Supreme Court; and thinks to make their definition of treason to conform to his ideas. An assemblage of men on the island, without any publicity, without force, and, I may say, without numbers, is sufficient to constitute an act of levying war. [Mr. W. read a part of the opinion, and of the opinion of the chief justice at the time of first committing Mr. Burr. Sect. 5.] Now it is evident that the gentleman on the other side considers that he has, by reading this paragraph of the opinion, produced a complete definition: but, if he goes a little farther he will find, that the words "by force," sect. 8. is necessary to produce a treason; and this is the opinion of judge Chase in another case. I refer however only to your honour's opinion of the commitment, which expressly requires that there must be force; troops must be embodied, and men must be assembled to "levy war."

But we are told that Fries's counsel laid down this principle. Why, sir, it is well known that the declarations or opinions of counsel are not authority. But, their opinions do not come to the point. However, since their opinion of counsel are brought forward, permit me to give the opinion of the counsel for the prosecution, Mr. Rawle, p. 179 of the trial. He says that actual force is not necessary to make the crime of levying war, but the

attempt must be made by terror, or by intimidation, with numbers sufficient to accomplish the object: provided the object be of a general nature. We will put this illustration: a body of men, sufficient in numbers and in means, to take the capitol and all the property that is in it, is prepared: they march into the city, and find no opposition, because they do that by terror of a number and warlike appearance which accomplishes their object. This is denominated potential force: they obtain their object without the actual execution of force, though force sufficient to accomplish their object is employed. Mr. Sitgreaves, who assisted Mr. Rawle, is still more explicit, p. 19, 20. "A tumultuously raising the people, with force, for the purpose of subverting or opposing the lawful authority of the government, in which those insurgents have no particular interest, distinct from the people at large," is the definition he gives of treason. "It must be a war waged against the United States." This is an important distinction.—"It must be avowedly levying war against the United States." Justice Foster to be sure allows of potential force, but if you examine all his writings, you find that it was his opinion that actual violence must be used before the act of treason could be said to be committed. Now surely it would be an actual violence, if they were to go to the palace of the king, and order him away, if the force was sufficient to compel his obedience: even though there should be no act of war committed. We shall not find a case in the books that goes farther than this. *Vaughan's* case comes the nearest to the prosecutor's advantage. He had been carrying on war against his country under a foreign commission from a foreign prince (France) in a ship called the *Royal Clencarty*, but meeting with a ship of superior strength, he struck without battle. There were two counts in the indictment: one for levying war against the king; the

other for adhering to the king's enemies. Lord Ch. Just. Holt, on that case says, that marching with arms is levying war, if the act be of a public nature. The court even doubted how far the sailing with a French commission, or privateering, would support the prosecution, since there was no open act of war done, but they depended upon that count which charged him with adhering to the king's enemies. I shall therefore rely upon the form of the indictment, and think it necessary to be proved that there was an *overt* or *open* act of hostility commenced and carried on. I do not know but I might have gone too far when I considered the indictment vitiated by the omission of the word "public." I find that in the second trial of Fries, the word public is omitted in the indictment, though it is in the first indictment, and is usually inserted. Whether, therefore, it is absolutely necessary or not, it is useless to take up the time of the court to argue. But this is not all that, between his indictment and his argument he thinks a minute omission. It seems as though he thought it unnecessary to prove military array; actual force, terror, or intimidation as well as that the act should be public: and he would make no ingredient necessary to prove levying of war—but that it might be committed, without any act, without arms, without force, and in private. If this is to be the law of treason, I know of no man who would be safe, because the crime would consist in a criminal intent; but, sir, we have reason to felicitate ourselves that neither the laws nor constitution of this country know of no such a definition of *crime*.

Again. The gentleman's doctrine would leave no room to draw back: he takes away the *locus pœnitentiæ* entirely. Now suppose a war against the state of Virginia is intended in the bosom of any man: but before he comes to the act, he repents and goes no farther, but withdraws

altogether from his scheme: shall this man be punished as a traitor, when he has done no traitorous act, but repented of it before its intended commencement? And so, if a body meet together and separate without doing any thing, shall their assembling be denominated treason? Now what can he call the *intention* of a body of men, when, perhaps, there are not two of them who have the same ideas as to the object? Such a vague and uncertain set of ideas never can merit the serious regard of any court, when they are intended to define so high a crime as treason. I trust in God that such doctrine will be never again urged in this country, because it would introduce into this country the alarming doctrine of constructive treason, and, indeed, of the worst kind, by diving into the very thoughts and intentions of a man; and it would introduce worse than the most rude and cruel times of antiquity. Supposing that such horrid principles must be disclaimed, and that those rude times never can return, nor such men be again found to exercise injustice, I will examine what is the nature of this case, upon the ground of the evidence which has been produced.

The first witness was Peter Taylor, who, being present, ought to have known what passed at the island. The court have heard his testimony; and doubtless have paid accurate attention to it. There is not one word in it which proves the least circumstance of war. He saw four or five rifles among thirty men; and says there were a few bullets run. Now certainly their liberty to carry rifles and to run bullets will not be disputed. But they had some powder. Why their rifles and bullets would be useless without that:—they had but a small quantity even to kill their game with; and there was no military parade observed. But he saw another thing; he saw Mr. Woodbridge take up Mrs. Blannerhasset from the landing to the house! Now Mr. W. says he did not; that he was

in bed at that time. Mr. Love, Mr. Blannerhasset's groom, and Mr. Woodbridge both declare as to the state of things generally there: that all was peace and quietness, only to be sure that they did not mean to be insulted by any mob who might come there, perhaps to pull down Mr. Blannerhasset's house, or do other damage.

Mr. Hay. Does it appear fair, sir, for a counsel to argue upon these halves or tenths of testimony, in order to mitigate an offence, when we declare to the court and to them that we have many more witnesses, if we were permitted to produce them, that would give a *character* to this transaction. We can prove that the bullets were not run for the purpose of killing squirrels and hares, but for killing the people of the United States, if they would not let them take New Orleans without. Now, sir, I ask the court whether there was ever such a thing permitted in a court of justice before.

Chief Justice. I understood, and it was so expressly stated, that all the testimony relative to the transaction at Blannerhasset's island was gone through. It is urged that the prosecution have other testimony to produce, connected with it, and collected from other circumstances, to show the intention. Now the argument is upon this point, for it is contended that if the transactions on that island are all given in evidence, there is no right to go farther into the examinations until it be proved that an act of war was committed there. How far the evidence may prove that point remains to be decided, upon the evidence.

Mr. Hay. It is my expectation, sir, to be able to prove, not only a complete union of all the proceedings, but the actual character of these proceedings. I wish to prove the junction of the forces, after they descended the Ohio to Cumberland island. And then to produce a view of their object in going down the Ohio and Mississippi,

towards the execution of their design. This I considered to be the province of the jury to determine; and, therefore, I imagine a motion to stop the evidence, and to discharge the jury, to be out of order. I confess that I never have heard a motion made upon the assumption of a point until now. I hope the gentlemen will not contend that this point was conceded. I told them and the court, that I did not admit the propriety or applicability of their motion; and therefore the fact ought not to be assumed, that there was no more evidence. We say, sir, that we have testimony; and we presume to say, that it ought to be gone through. I have never heard a motion made like the present, upon the mere presumption that the prosecutor cannot support his indictment.

Chief Justice. I did conceive, and do now conceive, that there is no sort of question as to the regularity of the motion now made; and that the court is compelled to grant it. I can assure the gentlemen that there is the most earnest desire in the court to hear all the evidence in this case; but the court is bound by the law to hear the argument of all the parties upon any regular motion, as much as to render a judgment. It certainly is a right at all times enjoyed to move for an argument upon the relevancy of any particular species of testimony; and the court must hear the argument. The counsel on the other side say that no testimony is relevant to the case, but such as is strictly attached to the transactions on Blannerhasset's island. Now you declare that you mean to show the guilt of the prisoner by extrinsic circumstances, and not the transaction itself. I have understood you to say that you have no more evidence of the transactions there. Now, sir, I do not say that it is improper to go into the other testimony, but the counsel on the other side contend that it is: they say you are not to produce that testimony unless you first prove the overt act on the

island. Therefore, now you have said that you have no other testimony, they are going on to argue upon the weight of what has been given, and upon the inadmissibility of any more. Upon this the court is bound to hear them.

Mr. Hay. It is very extraordinary that they should argue against the introduction of other testimony, drawn from that which has been already produced, and which, of itself, must be, in its nature, partial.

Mr. Burr. I remind the court of what passed in their presence. It was my earnest desire that every thing which related to what was called *the war*, should be given in evidence; and it was only for that purpose that I did not state the other point to the court at an earlier period, or, indeed, at the opening of the prosecution. I waited for the evidence, in order to prove that this was not a war at all. Day after day have we urged the prosecution to come forward with the "overt act," and now at length we find that they have no proof of such a thing, nor the resemblance of such a thing. They cannot wonder, therefore, that we require an argument upon it, unless they consent to give up the point. And all the other evidence which they can bring will not make that treason which is not so in itself.

Mr. Wickham. We say, sir, that having proved every thing that they can prove, as to what relates to the overt act, that it is not, *in itself*, an act of war; and therefore, all declarations, or all evidence that relates—even I will say to the *quo animo*, is inadmissible: for if there be no overt act proved, the proof of intention is not admissible by law. Now, sir, how can I show that there is no sort of evidence of the overt act, unless I am permitted to state what that evidence is? Mr. Woodbridge states that every thing was peaceable and quiet on the island when he was there, (which was the night of their departure),

and every one else says the same. He is asked what passed between him and Mr. Tyler? He says that he would not oppose the constituted authorities of the country, if he should be attacked by authority, but should patiently submit—but if he should be attacked by a mob, who had no powers, he would resist. Mr. Dana perfectly agrees with Mr. Woodbridge. He passed over there, and not a word was said to him, or a question asked, though the people did not know who he was. And yet this was the period of the existence of this bloody war! Poole was employed by the government of Ohio to watch for Mr. Blannerhasset, and what does he say? Why he was half a mile off, and he saw some men with guns, or they might be sticks, for what he could tell, and he observed a certain question to be asked when a boat was hailed. Now what was the true state of this business? Mr. Blannerhasset's men, and Mr. Tyler's men, were both on the island. Mr. Tyler's people had been out a shooting, (as is common in the country, and as the evidence will prove); now, it was natural to suppose, that as they had not any connexion, Mr. Blannerhasset's men would not go for Tyler's, nor Tyler's for those of Blannerhasset, and therefore it was proper to hail the boat they belonged to. Now, sir, I will even suppose that the name of Tyler's boat might be mistaken by the witness for I's boat; and that will explain the circumstance: but be it how it may, it is no evidence of war, and it is impossible to construe it to that meaning.

There is another witness, if I can possibly suppose that this man's evidence can deserve the least attention; and that is Albright. Now two witnesses are requisite to prove an overt act of treason: but I will for a moment suppose that this man believed what he gave in evidence to be true. Why, sir, that would not be a competent evidence of a fact: it is not legal testimony, however true.

Gen. Tupper is stated to have come over to Virginia (Blannerhasset's island) to arrest a man, from the authority of Ohio. Gen. Tupper is not examined as to this fact, but if he had he could produce no legal authority for arresting a man in Virginia, and therefore, if it had been true that the pieces were presented, which we deny to have been the fact, it would not have been an overt act of treason, because he had no authority to lay his hand on any man in Virginia in the name of the state of Ohio. But no warrant has been shown, or proved to have existed. And, sir, what is a good evidence to the contrary of that such did exist, is that Gen. Tupper was with them and wished them a good voyage. But to prove an act of treason, it is necessary to prove a real arrest from legal authority; for without that a resistance itself would have been no act of treason. Gen. Tupper is here; and the attorney might have examined him if he had thought it to his advantage: but I presume it was not.

But, sir, against whom is this treason committed?

If it is against any, it is against the state of Virginia, because it must have been under the law of Virginia that the process was granted, or else it could have amounted to nothing.

But this man says that he saw a number of guns, at different times, equal to the number of men that were there. Now, how could he possibly know the number of guns that were there, when he confesses that he did not see them all together, but at different times. Now, it is most obvious, that if this can be called treason, any thing may be denominated treason, that any government may choose to make so. But the gentleman seems to think that the latitude of treasons ought to be extended; because, in a free government there is no danger but every man will have fair play. This argument might, at first sight, appear very sound, but if you couple with it a doc-

trine which was advanced the other day, that a majority ought to govern, we shall not find it so safe; for we may find from experimental writers on the subject, that factions are more felt in a free government, than under one which is despotic. We have our parties and our factions, to be sure; but in the country governed by Bonaparte, or in his camps, there is no faction or party: but who would not prefer the government of laws? Upon the ground, therefore, of keeping us from the power of party, and fixing the principle of crimes, our constitution and laws were established.

Sir, I have gone through what I had proposed. These are questions, which not only affect my client, but the citizens at large of this country: and I only observe, that when the counsel have to oppose this doctrine, it must be upon abstract principles; and there is no ground besides, of whatever nature. Indeed, they must contend, or admit, that the constitution of the United States, which was drawn with so much care and attention, is a dead letter—that the citizens of the United States may be hurried, no matter how, from one end of the United States to the other; and be charged with the commission of crimes where they never have been, and in company with persons utterly unknown to them. All this, and more might be the consequence. They might be tried under an indictment that does not even specify what they were brought there for—They might be liable for crimes that are not even named; and connected with persons that they never heard of. Indeed, they must go beyond that: they must even say that judge Jeffries was right, and that all the moderate sages of this country were wrong, before they can convict my client of treason. Besides this, they must contend that the law of treason is totally misunderstood; and that it is whatever they please to make it—and that levying war against a government is to be done,

without arms, without military force, and without men! All this, and more, must be contended for, upon this principle, wherever the crime shall be charged, and against whomsoever. I do not, here, pretend to charge the government: God forbid that I should make the slightest reference to their being the authors of this prosecution, or that I should ascribe it to any of the gentlemen on the other side. I believe that both the government and they would disclaim any wrong action. But there may be some agents who would wish it; and who ought not to be trusted so far as they are in the concerns of the government. However, I wish to make no reflections, but to consider the question more as regards futurity, and not my client, who cannot be involved under this indictment. The principles themselves, and not my client, particularly, demand the attention of the court; and solely upon this ground I have taken up so much of the time of the court.

SPEECH OF MR. WIRT,

**ON THE TRIAL OF AARON BURR, LATE VICE-PRESIDENT OF THE
UNITED STATES, FOR HIGH TREASON.**

[IN REPLY TO MR. WICKHAM.]

MAY IT PLEASE YOUR HONOURS:

IT is my duty to proceed on the part of the United States in opposing this motion. But I should not deem it my duty to proceed, if I thought the motion itself well founded. I stand here with the same independence which belongs to the attorney of the United States, and as he would certainly relinquish the prosecution the moment he became convinced of its injustice, so also, most certainly would I. The hu-

manity and justice of this nation would revolt at the idea of a prosecution pushed against a life which stood protected by the laws; but whether they would or not, before I would plant a thorn in my own heart to rankle there for life, by opening my lips unconscientiously in such a case, I would seal them up for ever. Believing, however, as I do, that this motion is a mere manœuvre to obstruct the enquiry, to wrest the trial of the facts from the proper tribunal, the jury, and embarrass the court with a responsibility which it ought not to feel, I hold it my duty to proceed—for the sake of the court, for the sake of vindicating the trial by jury, now sought to be violated—for the sake of full and ample justice in this particular case—for the sake of the future peace, union and independence of these states, I hold it my bounden duty to proceed.

And while I do so, let me request the prisoner and his counsel to consider the difficulty of clothing my argument in terms which may be congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreasonable degree of sensibility on this occasion. They seem to forget the nature of the charge and that we are the prosecutors. We do not stand here to pronounce a panegyric on the prisoner, but to urge home upon him the charge of treason against the United States. *Treason* is the charge; when we speak of treason we must call it treason; when we speak of a traitor, we must call him a traitor; when we speak of a plot to dismember the union, to undermine the liberties of a great portion of the people of this country, and to subject them to an usurper and a despot, we are obliged to use the terms which convey these ideas. Why, then, are gentlemen so sensitive? Why on these occasions so necessary and so unavoidable, do they shrink back with as much agony of nerve as if, instead of a hall of justice, we were in a drawing room with Col. Burr, and were barbarously violating towards him, every principle of decorum and humanity.

We have, indeed, been invited by Mr. Wickham to conduct this argument on abstracted ground; and have been told that it is expected to be so conducted: but, sir, if this were practicable, would there be no danger in it; would there be no danger while we were moot-ing points, pursuing ingenious hypotheses, chasing elementary principles over the wide extended plains and alpine heights of abstracted law, that we should lose sight of the great question before the court. This may suit the purposes of the counsel for the prisoner; but it does not, therefore, necessarily suit the purposes of truth and justice. It will be proper when we have derived a principle from law or argument, that we should bring it to the case before the court in order to test its application and its practical truth: in doing which we are driven into the nature of the case, and must speak of it as we find it. But, besides, the gentlemen have themselves rendered this totally abstracted argument impossible; for one of their positions is, that there is no overt act proven at all. Now, that an overt act consists of fact and intention has been so often repeated here, that it has a fair title to Justice Vaughan's epithet of *decantatum*; in speaking then of this overt act, we are compelled to enquire not merely into the fact of the assemblage, but the intention of it; in doing which we *must* examine and develop the whole project of the prisoner. It is obvious, therefore, that an *abstract* examination of *this point* cannot be made: and since the gentlemen drive us into the examination, they cannot complain if, without any softening of lights or deepening of shades, we exhibit the picture in its true and natural state.

This motion, sir, is a bold and original stroke in the noble science of defence. It shows the hand and genius of a master. For while it gives to the prisoner the full benefit of his legal defence, of the whole and sole defence which

he would be able to make to the jury, if the evidence were gone through, it cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of that assemblage, and to stamp, beyond controversy, the character of treason upon it. Connect this motion with that which was made by the prisoner the other day, to compel us to begin with proof of the overt act, in which, from their zeal, gentlemen were equally sanguine, and observe what would have been the effect of success in both motions; we should have been reduced to the single fact, the insulated fact of the assemblage on the island, without any of that evidence which explains the intention and object of that assemblage; thus gentlemen would have cut off all the evidence which carries up this plot almost to its conception; which, at all events, describes the first motion which quickened it into life, and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation: Of the *world* of evidence which we have, we should have been reduced to the speck, the atom which relates to Blannerhasset's island; General Eaton's published narration, hitherto so much and so unjustly reviled, would have been without the strong corroboration of Commodore Truxtun, and the still stronger and most extraordinary evidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit as they have heretofore done; not declaring that what General Eaton had sworn, was not the truth, but that it was *a most marvellous story! a most wonderful tale!* and thus would they have continued to seek in the bold and wild extravagance of the project itself, an argument against its existence, and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt. But I ask what inference is to be drawn from these repeated at-

tempts to stifle the prosecution and smother the evidence. If the views of the prisoner were, as they have been so often represented by one of his counsel, *highly honourable to himself, and glorious to his country*, why not permit the evidence to disclose these views? Accused as he is of high treason, he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in showing us, by evidence, all this honour and this glory which his scheme contained.—No, sir, it is no squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is fear; or rather, it is the certainty that the evidence, whenever it shall come forward, will fix the charge; and if such shall appear to the court to be the motive of this motion, your honours, I well know, will not be disposed to sacrifice public justice committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no farther than the rigour of legal rules shall imperiously constrain you.

I come now to answer the argument of the gentleman (Mr. Wickham) who spoke first in support of this motion. I will treat the gentleman with candour. I will not follow the example which he has set me on a very recent occasion. I will not complain of flowers and graces, when none exist. I will not, like him, in reply to an argument, as naked as a sleeping *Venus*, though certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce and then that furbelow, before I can reach the wished for point of attack. I keep no flounces or furbelows ready manufactured and hung up for use, in the millinary of my fancy—and if I did, I think I should not be so indiscreetly impatient to get rid of my wares as to put them off on improper occasions. I cannot promise to

interest you by any classical and attic allusions to the pure pages of *Tristram Shandy*; I cannot give you a squib or a rocket in every period; for my own part I have always thought these flashes of wit, (if they deserve even that name,) I have always thought these meteors of the brain, which sprung up with such exuberant abundance in the speeches of that gentleman, which play on each side of the path of reason, or sporting across it with fantastic motion, decoy the mind from the real point of enquiry, no better evidence of the soundness of the argument with which they are connected, nor, give me leave to add, the vigor of the brain from which they spring, than those vapours which start from our marshes and blaze with a momentary combustion, which, floating on the undulations of the atmosphere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed.

I will endeavour to meet the gentleman's positions fully and to answer them fairly; I will not, as I am advancing towards them, measure with my mind's eye, the height, breadth and power of the proposition; if I find it beyond my strength, halve it; if still beyond my strength quarter it; if still necessary, subdivide it into eighths; and when by this process I have reduced it to the proper standard, take one of these sections and toss it with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion as the proposition itself which I am going to encounter. In commenting on the gentleman's authorities, I will not, with sarcastic politeness, thank him for introducing them; declare that they conclude directly against him; read just so much of the authority as serves the purpose of that declaration, omitting that which contains the true point of the case which

makes against me; nor if forced by a direct call to read that part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air, and exclaim, "just as I said," when I know it is just as I had not said. I know that by adopting these arts, I might raise a laugh at the gentleman's expence; but I should be very little pleased with myself, if I could enjoy a laugh so raised. I know, too, that by adopting such arts, there will always be those standing around us, who have not comprehended the whole merits of the legal discussion, and with whom I might shake the character of the gentleman's science and judgment as a lawyer. I hope I shall never be capable of such a wish; and I had hoped that the gentleman himself felt so strongly that high, aspiring and ennobling magnanimity which I had been told that conscious talents rarely failed to inspire, that he would have looked with disdain on the poor and fleeting triumph which could be gained by arts like these.

I proceed now, sirs, to answer his points so far as they could be collected from the general course of his speech. I say so far as they could be collected; for the gentleman, although requested before he began, refused to furnish us with his points in writing. It suited better his partizan style of warfare to be perfectly at large; to change his ground as often as he pleased; to-day on the plains of Monmouth—to-morrow at the Eutaw Springs. He will not censure me, therefore, if I have not been correct in gathering his points from a desultory discourse of four or five hours length. I trust, however, that I have been correct; it was my intention to be so; for I can see neither pleasure nor interest in *misrepresenting* any gentleman, and I now beg the court or the gentleman, if he will vouchsafe it, to set me right if I have misconceived him.

I understand him then, sir, to resist the introduction of farther evidence under this indictment on these four grounds.

1. Because Aaron Burr, not being present on the island at the time of the assemblage, cannot be a principal in the treason within the constitutional definition; nor within the *laws* of England.

2. Because the fact must be proved as laid; and as the indictment charges the prisoner with levying war with an assemblage on the island, no evidence, to charge him with that act by relation is relevant to this indictment.

3. Because if he be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no parol evidence can be let in to charge him until we shall show a record of the conviction of the principals in the first degree.

4. Because no evidence is relevant, to connect the prisoner with others and thus to make him a traitor, by relation, until we shall previously show an act of treason in those others; and the assemblage on the island was not an act of treason.

Let us examine the first ground: it is because Aaron Burr, not being present on the Island at the time of the assemblage, cannot be a principal in the treason within the constitutional definition nor within the laws of England.

In many of the general reflections expressed by the gentleman under this head I perfectly accord with him; as that the constitution intended to guard against arbitrary and constructive treasons; that the principles of sound reason and liberty require their exclusion. I have no objection either to his position, that the constitution is to be interpreted by the rules of reason and of moral right. I fear, however, that I shall find it difficult to accommodate both the gentlemen who have spoken in support of the motion; for while Mr. Wickham demands reason for the guide of our interpretation, Mr. Randolph exclaims "save us from the deductions of common sense." A kind of reason which is not common sense, would, indeed, be adopt-

ed to the joint purposes of both the gentlemen; but as that is a species of reason of which I have no very distinct conception, I hope the gentlemen will excuse me for not employing it. Let us return to Mr. Wickham. Having read to us the constitutional definition of treason and given us the rule by which it was to be interpreted, it was natural to expect that he would have proceeded directly to apply that rule to the definition and give us the result. But while we were expecting this—even while we have our eyes upon the gentleman, he vanishes like a spirit from American ground, and we see no more of him, until re-surfing in England, by a kind of intellectual magic, we find him in the middle of the 16th century, complaining most dolefully of the state of my lord Coke's bowels. Before we follow him in this excursion, let us enquire what it was that made the gentleman start with such terror from the regular track of his argument. It was, sir, the decision of the supreme court in the case of Bollman and Swartwout: it was that judicial exposition of the constitution by the highest court of the nation, upon the very point which the gentleman was considering. Sir, if the gentleman had believed this decision favourable to him, we should have heard of it in the beginning of his argument, for the path of enquiry in which he was, led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity: he would have set it before you in every possible light: he would have illustrated it; he would have adorned it; he would have expanded it; you would have seen it, under the action of his genius, loom with all the varying grandeur of our mountains in the morning's sun. He would not have relinquished this decision, for the common law; he would not have deserted a rock so broad and so solid, to walk upon the waves of

the Atlantic. But he knew, sir, that this decision was against him: he felt, too, that it closed against him completely the very point which he was labouring. Hence it was that the decision was kept so sedulously out of view, until from the exploded materials of the common law, he thought he had reared a Gothic edifice, so huge and so dark as quite to overshadow and eclipse it. Let *us* bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself; and least of all from a source so high and so respectable as the decision of the supreme court of the United States. Let it be remembered that the enquiry is, whether *presence* at the overt act is necessary to make a man a traitor: *it is necessary*, say the gentlemen; what says the supreme court? "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country: on the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all those who form any part, however minute or *however remote from the scene of action*, and who are actually leagued in the general conspiracy, are to be considered as traitors."* Here then we find the court so far from requiring presence, that they expressly declare that *however remote* the accused may have been from the scene of the treasonable assemblage, he is still involved in the guilt of that assemblage; that he was *leagued in the general conspiracy* which produced it, is sufficient to make the overt act his own. The supreme court being of that opinion, proceeded to an elaborate examination of the evidence to ascertain whether there had

* Decision of the supreme court, in the case of Bollman and Swartwout.

been a treasonable assemblage. They look to the depositions of Gen. Eaton and Gen. Wilkinson, to the cyphered letter, to the declaration of Swartwout, that Burr was levying an armed body of seven thousand men; and they look to these parts of the evidence expressly for the purpose of discovering whether it was probable that *Burr* had actually brought those men together; not whether Bollman and Swartwout were present at any such assemblage; they knew that if any such assemblage had taken place, Bollman and Swartwout must have been, at the time, at the city of Orleans, or on their way thither: indeed, the whole reasoning of the court proceeded on the fact, as admitted, of the prisoner's absence. Why then, the laborious investigation which the court make as to the probability of *Burr's* having brought his men or any part of them together, unless the guilt of that assemblage was to be imputed to Bollman and Swartwout? If their absence had been sufficient to excuse them, that fact was admitted, and the enquiry would have been a very short one. But the court having previously decided that the fact of presence or absence was unimportant, that it made no odds how far distant the accused might be from the treasonable assemblage, it became the unavoidable duty of the court to proceed to the enquiry whether any such assemblage had taken place; and if the evidence had manifested that fact to their satisfaction, it is clear that in the opinion of that court, the prisoners would have been as deeply involved in the guilt of that assemblage as any of those who actually composed it.

The counsel knew that their first point was met directly by the counter authority of the supreme court; they have impliedly, if not expressly, admitted it; hence they have been reduced to the necessity of taking the bold and difficult ground that the passage which I have read is extrajudicial—a mere *obiter dictum*. They have *said* this; but

they have not attempted to *show* it. Give me leave to show that it is not an *obiter dictum*: that it is not *extra judicial*; but that it is a direct adjudication of a point immediately before them. The court made no formal division of the subject. It divided itself. The arrest of Bollman and Swartwout at New Orleans, and the fact that they had not been present at any assemblage of the traitors in arms, were notorious and admitted. The case necessarily presented to the court three distinct questions: 1. Are these men leagued in any treasonable conspiracy? 2. Is the fact of their being leagued with it, sufficient of itself, to implicate them in the guilt of any overt act of that treason? or is it necessary that they should actually have borne a part in that overt act? 3. Has there been an overt act? Now if the court had been satisfied that there had been an overt act, and that these men were leagued in the conspiracy which produced it, still it would have remained a distinct and substantive question, whether their absence from the overt act, and their having no immediate hand in it, did not discharge them from the constitutional guilt of levying war; for although leagued in the conspiracy and although there might have been an overt act, these men would have been innocent, if presence at the overt act was necessary to make them guilty. The question, then, of presence or absence, was a question really presented by the case of Bollman and Swartwout: it was one important to the decision of that case; and the court, thinking it so, did consider and decide it in direct opposition to the principle contended for on the other side.

Here, sir, having the authority of the supreme court on my side, I might safely dismiss the gentleman's first point. But Mr. Randolph seems to think it doubtful whether you ought to be bound by that authority, even admitting it to be a regular judicial determination of this question; for he made a very pathetic and affecting apostrophe to the situation in which you would be placed, if you differed

from this opinion of the supreme court. I can discern nothing very tragical in your situation;—a principle of law, solemnly adjudged by the supreme court, becomes, I apprehend, the law of the land: all the inferior courts of the United States are bound by it. To say that they are not bound by it, is to disorganize the whole judiciary system, to confound the distinctions and grades of the courts, to banish all certainty and stability from the law, and to destroy all uniformity of decision. If you, sirs, sitting as a circuit court, are not bound by the adjudications of the supreme court in this case, neither would any other circuit court in the union be bound by it: and the result might be and certainly would be that what would be treason in one circuit, would not be treason in another: and a man might be hung in Pennsylvania for an act against the United States, in which he would be held perfectly innocent in Virginia: thus treason against the United States would still be unsettled and fluctuating, and the object of the constitution in defining it, would be disappointed and defeated. I trust that we are not prepared to rush into this wide disorder and confusion; but that we shall temperately and regularly conform to the decrees of that parent court, of which this is a mere branch, until those decrees shall be changed by the same high authority which created them.

But instead of reposing on the authority of that decision, let us go further, and let us indulge the gentlemen with the enquiry whether that decision is in conformity with the constitution of the United States and the laws of England.

In interpreting the constitution let us apply to it the gentleman's own principles; the rules of reason and of moral right.

That a law should be so construed as to advance the remedy, and repress the mischief, is not more a rule of com-

mon law, than a principle of reason; and in reason, it applies to penal as well as remedial laws: so also, the common law maxim that a law, as well as a covenant, should be so construed as that its object may rather prevail than perish, is one of the plainest dictates of common sense. Apply these principles to the constitution. Gentlemen have said that its object was to prevent the people from being harassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime and to provide for its punishment. The same liberties of the people which required that the offence should be defined, circumscribed and limited, required also that it should be certainly and deeply punished: and the framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this republic might, one day or other, be seized by the daring ambition of some domestic usurper, have given peculiar importance and solemnity to the crime by engrafting it upon the constitution. But they have done this in vain, if the construction contended for on the other side is to prevail. If it requires actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avow this guilt and escape punishment for ever? He may secretly wander like a demon of darkness from one end of the continent to the other; he may pour poison into the simple and unsuspecting minds of his countrymen; he may seduce them into a love of his person; may connect them in his plots; attach them to his glory; he may prepare the whole mechanism of the stupendous and destructive engine and put it in motion; let the rest be done by his agents; let him keep himself only from the scene of the assemblage or the immediate spot of battle, and he is innocent in law, while those whom he has de-

luded, are to suffer the death of traitors. Is this reason? Is this moral right? Is this a mean of preventing treason? Or is it not rather, in truth, a direct invitation to it? Sir, it is obvious, that neither reason nor moral right require actual presence at the overt act to constitute the guilt of treason: nor can a sound mind, or a sound heart doubt one moment, between the comparative guilt of Aaron Burr (the prime mover of the whole mischief) and of the poor men on Blannerhasset's island, who called themselves Burr's men. There is a moral sense much more unerring on questions of this sort, than the frigid deductions of jurists or philosophers. The decision of the supreme court, sir, is so far from being impeachable on the ground of reason and of moral right, that it stands supported by their most obvious and palpable dictates. Give to the constitution the construction contended for on the other side, and you might as well expunge the crime from your criminal code: nay, you had better do it; for by this construction you hold out to ambition and talents, the lure of impunity; while you loose the vengeance of the law on the comparatively innocent.

Sir, the decision of the supreme court is equally supported by the law of England. Lord Coke, commenting on those words of the statute of Edward, which make our constitutional definition of treason, says, "if *many* conspire to levy war, and *some* of them do levy the same according to the conspiracy, this is high treason *in all*, for in treason all are principals when war is levied." 3 Inst. 9. In page 16, he says, that although the statute of Mary, which first made counterfeiting the privy signet or sign manuel, high treason, says nothing of aiders, or consenters, "yet they are within the purview of this statute, *for there be no accessories in high treason.*" So also in page 21, he says, "In high treason there is no accessories, but all be principals; and therefore, whatever act or consent will make

a man accessory to a felony before the act done, will make him a principal in high treason." In page 131 he says, "it is a sure rule in law that *in alta proditione nullus potest esse accessorius, sed principalis solum modo*;" and in illustration of the rule he puts this case; "if any man commit high treason, and thereby becometh a traitor, if any other man, knowing him to be a traitor, doth receive, comfort and aid him, he is guilty of treason, for that there be no accessory in high treason." The gentleman, indeed, admits, that according to Coke's authority, their client, although absent, might be a principal in the act of treason. But Coke, they say, had no bowels; he was hard-hearted and cruel; his thirst for blood was so great that it misled his understanding. Coke, however, does not state the positions which I have read, on his own authority: on the contrary he cites in the margin the authorities on which he bottoms them, and most ancient and respectable authorities they are. But, to gratify the gentlemen, let us put Coke aside: What will they say to Lord Hale? Did any force and savage passion agitate his breast, or darken the horizon of his understanding? O! no, sir; no spot ever soiled the holy ermine of his office; mild, patient, benevolent; halcyon peace in his breast, with a mind beaming the effulgence of noon-day, and with a seraph's soul, he sat upon the bench, like a descended god!—Yet this judge has laid down the doctrine for which I contend, in terms as distinct and emphatic as those of Lord Coke. Here Mr. Wirt read 1 Hale's Hist. Pleas of the Crown, 214, 339, 323, 328, 613.—Hawkins and Foster, support the same doctrines. 1 Hawk. ch. 17, sec. 39; 2 Hawk. ch. 29, sec. 2. Foster 341.

I admit that judge Tucker has combated the doctrine, that in treason all are principals. I admit the truth of all the encomiums which the counsel for the defendant have pronounced on that gentleman. He has all the illumina-

tion of mind and all the virtues of heart, which they, with the view of enhancing the weight of his authority, have been pleased to ascribe to him. What they have said of him, from policy, I can say of him, from my heart, for I know it to be true. Yet give me leave, sir, to examine, very briefly, his argument upon this subject. His object is to prove, that the position "in high treason all are principals," is not law in England. The mode which he adopts to prove his point is this: he collates all the authorities which have supported this doctrine, and tracing it up, with patient and laborious perseverance, with the view, *petere fontes*, he finds the first spring in the reign of Henry VI. That case is reported in the year book 1 Henry VI. 5, and is very nearly as stated by Mr. Tucker from Stanford. It is simply the case of a man who broke a prison and let out traitors. Stanford says it was adjudged petit treason; the year book merely says, that he was drawn and hanged, a sentence which in those days when the notions and punishment of treason (notwithstanding the statute of Edward) remained still unsettled, is certainly no very unequivocal proof that this crime was petty treason. Mr. Tucker thinks this case not correctly reported, and that the grounds of the judgment seem not well understood. It is to be recollected, however, that these year books, as we are told by Blackstone, serve as indices to the records in the several offices in Westminster; Coke, then, Hale, Hawkins, Foster, and all those authors who have relied on this case as establishing the doctrine in question, guided by the marginal reference in the year book, had it in their power to examine the whole original record in the case, and thereby to understand the entire grounds on which that case proceeded. From their great industry and their prodigious research, there can be no doubt that they did so, and that they have therefore stated the principles of this case correctly. Chief Justice

Hussey, in the 3 Henry VII. 10, about sixty years after the first decision, and consequently with much better means of understanding its nature, extent and boundaries than we can possess, refers to it as asserting the doctrine, that in treason there are no accessories, but all are principals. Nor is it to be believed that this doctrine originated in the reign of Henry VI. The earliest reported case indeed which has come down to us, occurred in the first year of that reign. There is nothing, however, in the manner of the report which marks it as a case of the first impression; on the contrary the sentence seems to have been a thing of course, and the judges of that day appear, in the language of Blackstone, to be merely pronouncing the immemorial custom of the land. The learned and laborious Hawkins, speaking, no doubt, after the most profound and extensive research, declares, in a passage before cited, that it seems to have been *never doubted* that in treason all are principals. And most certainly, from a very early period in the fifteenth century to the present day, that doctrine has not been questioned in England. After such a lapse of years and centuries, after such full and perfect consent and concurrence among all the judges and all the writers of England, it would be bold in us to say, that this is not the law of England; and after all, the learned judge Tucker rests the fabric of his reasoning on the ground of the imperfection of the first report; an obstacle which, however insuperable to him, was easily to be surmounted by those great men who had access to the original record; and who having that access, have affirmed that the case justified the doctrine which they advance. Let me conclude my remarks on judge Tucker by observing, that however deeply and sincerely I revere him, yet certainly when the question is "what is the law of England," it cannot be considered as disrespectful to our learned and virtuous countryman to prefer the authority.

of such men as Coke, Hale, Hawkins and Foster, to his. It is on the authority of those distinguished men I shall rest my conclusion, that the opinion of the supreme court of the United States is in harmony with the English law.

But we are told by Mr. Wickham, that all this is elementary and theoretic: that there are no practical decisions worthy of respect which maintain the principle. Suppose this were so, would any judge require higher authority for the law of England than such names as those which I have just mentioned; would a case from the year books, decided by Hussey or Rian, or a case from the State Trials, decided by Brumley, Jeffries, or even Holt himself, be higher authority than Coke and Hale, Hawkins and Foster? Certainly not. The three cases, however, from the year books, in the reigns of Henry VI. and VII. on which judge Tucker comments, are adjudged cases which avow the principle. In addition to these, Coke, in the margin of the passages before read, cites several cases in the reign of Edward III. which I have not had time to examine, but which it is presumable from his learning and accuracy, are properly cited in support of this doctrine.

Mr. Wickham says, that the books show only two cases of accessories before the fact having been adjudged guilty as principals: but he admits that there are several cases of accessories after the fact being so adjudged; and he seems to be apprehensive that we shall reason from these later cases to the case of an accessory before the fact. I do not know that it is important, but the truth is that the gentleman, unintentionally, no doubt, has inverted the order of guilt in this case; *in reason*, the accessory before the fact, he who procures the act, or assists in bringing it about, is certainly much more guilty than the accessory after the fact, who having no previous knowledge of the fact, much less any agency or instrumentality in bringing it about,

merely receives and comforts the man who has done it. This line of discrimination, so strongly drawn by *reason*, was long respected by *the law* of England, and so far were accessories after the fact from occupying the worst ground, that while it was *never* doubted that accessories before the fact were guilty as principals, it was *very long* doubted whether accessories after the fact were so guilty. This we are expressly told by Hawkins:—2 Hawk. ch. 29, § 3. I think, however, I shall show by and by that these accessorial doctrines have nothing to do with the case at bar.

The gentleman next read the case of Sir Nicholas Throckmorton's sufferings, as they are collected into a Gorgon's head by judge Tucker. We do not rely upon the authority of that case; and the gentleman, by reading it, has proved only what we readily admit, that Brumley was a judicial tyrant, and that Throckmorton was cruelly and barbarously oppressed. I can see but two motives which the gentleman could have had in view in reading this case with a countenance and cadence of such peculiar pathos; the first contains an implication not very respectful to the court: that it was necessary to hold up to this court, *in terrorem*, the immortal infamy of Brumley's name: the second to excite our sympathies, under the hope that when once set afloat, for the want of some other living object they might attach themselves to his client. It was with the same views, I presume, that the gentleman gave us the pathetic and affecting story of the lady Lyle as it is touched by the chaste and delicate pencil of Hume. It was with the same views, also, that he recited from the same author the deep, perfidious, and bloody horrors of a Kirk and a Jeffries. Sensible that there was nothing in this trial or in the virtues of his client to interest us, he borrowed the sufferings and the virtues of a Throckmorton, and a lady Lyle, to set our hearts a bleeding; thinking that our pity thus excited, would be gene-

rously transferred, assigned and set over by way of indorsement, to his client. I congratulate the gentleman upon the ingenuity of the device: the only defect in it is the great hazard, that while we are running parallels between his client and the *dramatis personæ* introduced from Hume, we shall find among them an apter prototype for him than in the virtuous and manly Throckmorton, or the simple, innocent and humane lady Lyle.

But we are told that, however the case may have been *prior* to the revolution of 1688, *since that period* they have leaned the other way, and go to show that accessorial acts will not make a principal in treason. How is this conclusion obtained: by any adjudged case? No. By any *obiter dictum* of a judge? No.—How then does the gentleman support the idea of this change in the English law? He infers it from the impunity of some of those who fought the pretender's battles or aided him in his flight. This is a new way of settling legal principles. Sir, this was the mere policy of the house of Hanover. The pretensions of the Stuarts had divided the British nation. Their adherents were many and zealous. Their pretensions were crushed in battle. Two courses were, then, open to the reigning monarch; either by clemency and forbearance to assuage the animosity of his enemies, and prop and brace his throne with the affections of his people; or to pursue his enemies with vengeance; to drive them to desperation; to disgust his friends by needless and wanton cruelty; and to unsettle and float his throne in the blood of his subjects. He choose the former course; and from this politic or magnanimous forbearance, it is argued, the law of treason was changed. To prevent this inference, according to the reasoning of the gentleman, it was necessary to have beheaded or hung up every human being who even aided the unfortunate Charles in his flight. Mr. Wickham has mentioned Miss M'Donald—and he

would have had the monarch to have hazarded the indignation and revolt of a generous people, by seizing that beautiful and romantic enthusiast, Flora M'Donald, and dragging her from her native mountains in the isle of Sky, to a prison, and to death. We are told, indeed, by Doctor Johnson, in his tour to the Hebrides, that this step, impolitic as it was, nevertheless was hazarded; hazarded but partially though; she was carried to London; but, together with M'Cleod who aided in the same flight, she was dismissed, on the pretext of the want of evidence. But certainly a forbearance to punish under an existing law, is no argument of the change of that law.

The gentleman, unable to sustain either by *adjudication* or *dictum* this novel idea that the law of treason is changed since the revolution of 1688, proceeds still farther in the attempt to support it by inference, and next infers from the special form of the indictment in Foster, 5—6, that presence at the overt act is indispensable to the treason of levying war. That indictment lays two overt acts of the treason; first the general overt act of assembling with an armed multitude and levying war; secondly the entering and taking the town and castle of Carlisle; from the special nature of which last overt act the gentleman deduces the conclusion, that the first was not sufficient, and that the last must necessarily have been proven to sustain the indictment; but is it any where decided that this second overt act was necessary? On the contrary in lord Balmerino's case (10 St. Tr. 605,) also cited by Mr. Wickham, where the indictment was precisely that in Foster, it is argued by the counsel for the crown and admitted by the court, in effect, that the proof of the second overt act was unnecessary; that it was immaterial whether the evidence shown him to have entered and taken the town of Carlisle or not; that it would be sufficient to introduce evidence to the first overt act—the general overt

act of levying war. Hence it is obvious that the specification of entering and taking the town of Carlisle was unnecessary and superfluous; therefore no inference can be fairly drawn from the insertion of it in the indictment. But it is strange that the gentleman should attempt to draw from the mere form of this indictment in Foster, the conclusion that the law of England was changed, and that an accessorial act would no longer make a principal in treason, when Foster himself expressly lays down the reverse of this principle, in the passage which I have before cited, and declares that *all* who are leagued in the conspiracy to levy war, are guilty of the levying whether present or absent—whether the war was levied by *a few* or *by all*. The same remark applies equally to the interference attempted to be drawn by Mr. Wickham from the case of Deacon and Wedderburne, reported by the same author.

Other remarks of the gentleman under this head as to accessories being the mere creatures of the common law, and the common law not existing in this country, will be more properly noticed under another head.

I hope it may now be justly considered as proven, that, whether we look to the laws of England, or to the constitution of the United States, as expounded by the rules of reason and of moral right, or as expounded by the supreme court of the United States, the prisoner's presence on Blannerhasset's island at the time of the overt act was not necessary to the constitution of his guilt; and therefore that there is nothing in the gentleman's first objection to prohibit the introduction of farther proof.

But if, after all, this court should be of opinion that the prisoner's presence on the island was necessary to make this an overt act of war, is not this a question for the jury? The question whether there has been an overt act of war, or not, is a mixed question of fact and law: it is the ques-

tion made by the issue in this case; it is the very question which the jury are sworn to decide. If, for this objection that presence is a material ingredient in the composition of the act, the court exclude all farther evidence, will this not amount to saying that we have not proved the overt act to the satisfaction of *the court*; that the evidence we have introduced, and all we propose to introduce, will be insufficient to satisfy *the court* of the overt act? And will not *the court*, hereby, take the place of the jury; forestall them in the very question which they are sworn to try, and snatch it from them by a *coup de main*? Gentlemen, indeed, try to give this question a legal attitude, by contending that other evidence will be irrelevant until the fact of presence shall be proven; but, then, in order to decide this question in the affirmative, the court must assume the function of a jury, and say that the overt act is not and will not be sufficiently proved without it. But suppose this question as to the necessity of presence, a question of pure law; still it would be a question which the jury would have a right to decide; since the law as well as the fact is completely within their power. The court may, indeed, after all the evidence shall be given, instruct the jury as to the law; they may instruct them as to what will constitute an overt act of levying war. But nothing more clearly shows the sovereign power and control of the jury both over the law and fact than this; that, even, after such instruction of the court, the jury may if they choose decide the case in opposition to such instruction. I do not say that they will do it; or that they ought to do it: but I say that they may do it if their conscience shall so direct; and I say this by the way of showing the paramount power of the jury, over the very question now sought to be withdrawn from them and given to the court. I conclude this point with assuming it as proved, that actual presence was not necessary to make the prisoner a principal in the

treason; and if the court shall think it was, that this is a question which cannot be taken from the jury.

This objection therefore furnishes no legal bar to the introduction of our evidence.

I proceed to examine the gentleman's second point. It is this; no farther evidence is admissible under this indictment, because the fact must be proved as laid; and as the indictment charges the prisoner with levying war on the island where it is proven he was not, there is an end of the case; no farther evidence can be let in under this indictment.

Under this head the gentleman began by commenting on the omission of the word *public* in the indictment; "why did not the attorney for the United States charge the prisoner with levying *public war*, instead of merely charging him with levying war; why was the word *public* left out?" and then with a countenance insinuating even more than his expression, he asked, "whether the word *public* was omitted to render the indictment more palatable to the grand jury?"

The answer is a very simple one; the indictment was drawn from an authentic copy of the indictment of Fries; it is an exact transcript of that indictment, with a mere change of names. There the word *public* is not found. Nor is it necessary that it should there be found. The indictment pursues the constitution and act of congress, and transfers from those instruments *verbatim* the definition of treason. The constitution does not say that treason shall consist in levying *public* war against the United States; but simply in levying war against them. So also is the act of congress. An indictment pursuing that definition in express terms is certainly sufficient to all intents and purposes. The word *public* is surely of no importance. The gentleman indeed, on the second day of his argument, admitted that it was of no importance; and ac-

knowledgeed his error in saying, that this was the first indictment which had omitted it. He acknowledged that in the second indictment of Fries it was omitted. It was natural to have expected that the gentleman, on this discovery, would have retracted the ungenerous insinuation that the word had been intentionally omitted in order to render the indictment more palatable to the grand jury. He thought proper, however, to let the insinuation remain where it was. Be it so. The attorney has the consolation that his purity is to be estimated by his country, and not by the prisoner or his counsel.

But it seems that the indictment charges the act to have been done with divers persons unknown; and we attempt to prove that it was done with persons who were known. This is an objection which I had supposed the manliness of the gentleman's understanding would have rejected. He thought proper, however, in the dearth of other materials, to urge it with his wonted spirit and to attempt to support it by authorities. He does not pretend, indeed, that any author, elementary or practical, has ever asserted that this is *necessary*. He does not pretend that any judge has ever declared it so. But he infers it from the specification of other names in several indictments, during the protectorship of Oliver Cromwell. He cites the cases of Hewitt and Mordaunt. I have examined those cases. They are not indictments for levying war; they charge the prisoners with delivering military commissions to several persons, who are named, in behalf of Charles II. Their offence, from the nature of it, required the naming of Charles II. and those to whom commissions were delivered. But in the treason of levying war the most usual form is to charge the war to have been levied with persons unknown, and that in cases where the persons certainly were known. Thus lord Balmerino and the earls of ~~Kilmarnock and Cromartie were in arms together on the~~

field of Culloden. They were taken prisoners together; they were severally indicted on the same day for the same offence; arraigned on the same day; and although, therefore, it is clear that they were all known to the attorney for the crown, yet each indictment charges them to have levied war with persons unknown. The gentleman says it is not enough to charge the prisoner with levying war; but that in the overt act we should have set out the particular acts which were done by the prisoner, and the evidence by which we mean to charge him. I deny, sir, that this is law. It is a question strictly legal, and therefore is to be decided by authority. East, 1 vol. p. 116, after stating that in every indictment for high treason, the particular species of treason must be charged *in the very terms* of the statute of Edward, as the substantial offence, adds that "then some overt act must be laid as the means made use of to effectuate the traitorous purpose." He proceeds, "The overt acts so laid, are, in truth, the charge to which the prisoner must apply his defence. And therefore it is in no case sufficient to allege that the prisoner compassed the king's death, or that he levied war against him, or adhered to his enemies; for upon a charge so general and indefinite he cannot know what acts he is to defend. The particular acts of compassing and adherence must be set forth; and in the other instance" (that of levying war) "it must be alleged *that he assembled with a multitude armed and arrayed in a warlike manner and levied war;*" and thus in our indictment it is alleged. East proceeds, "The indictments against Damaree and Purchase for pulling down meeting-houses, charged that they with a multitude, to the number of five hundred, to the jury unknown, armed and arrayed in a warlike manner with clubs and staves, and other arms offensive and defensive, levied war against the queen. No exception was taken to the indictment by Damaree's counsel; but on behalf of Pur-

chase it was objected that there ought to have been an overt act laid of the treason; because there being such a variety of facts which amount to levying war, if the particular facts intended to be brought forward against the prisoner were not alleged, he could not know how to make his defence. *But it was resolved by all the judges upon conference that the indictment was good; and that levying war being an overt act of itself, no other overt act need be alleged.*" The indictments in those cases are substantially stated by Foster, 213, 14, and the indictments themselves will be found in 8 St. Tr. 218, 19. Now in those cases the acts which these men did and which constituted their crime, was pulling down meeting-houses; but in the indictment there is not a word of meeting-houses, or any other houses; the overt act is, "that with a multitude armed and arrayed in a warlike manner they levied war against the queen:" and the court upon solemn argument, and after a conference, decide unanimously that the indictment is sufficient, and let in the particular evidence under it. And as to the overt act stating *the evidence* on which we mean to rely, it is expressly declared by East, 121, on the authority of a variety of cases which he cites, that "it is not necessary that the whole detail of the evidence should be let out." In direct confirmation of this doctrine are Foster, 194, 220. 1 H. H. P. C. 122. 4 St. Tr. 722. Lowick's case; and 4 St. Tr. 696-7. Rockwood's case.

Mr. Wickham does not say that this minute specification, on which he insists, has ever been adjudged necessary, but he infers it from the form of indictments in several cases which he has cited. They do not support him. In the cases of Balmerino, Cromartie, and Kilmarnock, it is true, as I have before stated, that those indictments lay as one overt act the entering and taking possession of the town and castle of Carlisle; but in the first

named case, this specification is declared to be unnecessary, and it is said that the general overt act of levying war with an armed multitude, would be sufficient to let in the evidence. These cases, therefore, instead of supporting Mr. Wickham, disprove the doctrine for which he contends. He still insists, however, that wherever it was intended to criminate a man by accessorial acts, the particular acts which he does, must be set out; and to prove this, he again cites the indictments in the cases of Hewitt and Mordaunt before mentioned, and of Cornish. I answer, first, that no legal principle can be safely inferred from the mere forms of the indictments in the State Trials. They have been continually shifting and changing. Thus the case cited by Mr. Randolph from the first State Trials, exhibits an indictment which is really a legal curiosity: the treason there charged is compassing the king's death, and the indictment is as much in detail as Pope's history of the parish clerk. But the inference that this detail is necessary, is refuted by express authority; 1 East, 124, 5. on various authorities informs us, that it is sufficient in that species of treason (compassing the king's death), to lay as the overt act, that A and B met, and proposed the king's death. Besides, what becomes of this inference from an indictment so much in detail (at a period when, as Mr. Randolph says, not a ray of judicial light had touched the English horizon) when in modern times of greater light, the indictments exhibit nothing of this detail. An inference from these modern indictments, that this detail is not necessary, is certainly as fair as the inference from the ancient indictments, that it is necessary. Thus your inferences are in conflict, and destroy each other. I refer you to the case of Lowick and Rockwood, first cited for another purpose, to show that this minute and circumstantial form of indictment is exploded. I refer you also to the Apprentice's case, 2 St.

Trials, 531, to show that under the general indictment for levying war, they go, in England, into the circumstances of the case at large. And secondly, I answer to Mr. Wickham's cases, that neither of them is for levying war. Hewitt and Mordaunt were indicted for giving commissions to officers of the exiled king; and this is not charged as accessorial to any greater act, as levying war.—The indictments are restricted to the single fact which I have stated, and contemplate no ulterior act. How then can it be said that those acts are of an accessorial nature, when the sole guilt in the case is consummated by the acts themselves which are charged, without borrowing any portion of that guilt from any subsequent occurrence? The other case, that of Cornish, charges him with promising assistance to the Duke of Monmouth; and here his indictment stops: it does not look to any thing else (as Monmouth's invasion) to complete the prisoner's guilt. His guilt is the promise; not the levying of war. There is nothing therefore in these cases to warrant the principle, that when a man is attempted to be implicated by accessorial acts in the treason of levying war, those accessorial acts must be detailed. There is nothing in them to prove that the charge of levying war with an armed multitude is insufficient; on the contrary, in the only case in which this point came directly in question before the court, it was unanimously and solemnly declared to be sufficient.

Is it not sufficient in reason as well as in law? Is it to be believed that A. Burr is not sufficiently apprised by this indictment, of the charge against him, to prepare for his defence? Has he not prepared, sir? Look at the fact. He himself states that he has summoned twenty or thirty witnesses.

Let us not then, sir, by these captious exceptions, unsupported either by law or reason, permit ourselves to be turned aside from the inquiry before us. Reason and

law concur in showing that there is nothing in Mr. Wickham's second point to obstruct the evidence.

I proceed, sirs, to the gentleman's third point, in which he says he cannot possibly fail: it is this; "because if the prisoner be a principal in the treason at all, he is a principal in the second degree, and his guilt being of that kind which is termed derivative, no farther *parole* evidence can be let in to charge him, until we show a record of the conviction of the principals in the first degree." By this position the gentleman is understood to advance in other terms the common law doctrine, that when a man is rendered a principal in treason by acts which would make him an accessory in felony, he cannot be tried before the principal in the first degree. I believe this to be, indeed, the doctrine of the common law. But it has no manner of application to this case;

1st. Because it is the mere creature of the common law of England.

2dly. Because if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoners in this case is of an accessorial nature.

1. Because this position is the mere creature of the common law. Neither our constitution nor act of congress distinguish between principals in the first and second degree; all who levy war against the United States, whether present or absent, all who are leagued in the conspiracy, whether on the spot of assemblage, or performing some minute and inconsiderable part in it, a thousand miles from the scene of action, incur equally the sentence of the law; they are all equally traitors. This scale, therefore, which graduates the guilt of the offenders, and establishes the order of their respective trials, if it ever existed here, is completely abrogated by the highest authorities in this country:—The convention

which formed the constitution and defined treason; congress, which legislated upon that definition, and the supreme judiciary of the country expounding the constitution and the law, have united in its abrogation. But let us for a moment put the convention, congress, and judiciary aside, and examine how the case will stand: still this scale of moral guilt, which Mr. Wickham has given us, is *the creature of the common law*; but he himself, in another branch of his argument, has emphatically told us, that the common law does not exist in this country; has stated that the creature presupposes the creator; and that where the creator does not exist, the creature cannot. The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule, which is the mere creature of it, exist in this country. So that the gentleman has himself furnished the argument which refutes this infallible point of his, on which he has so much relied. But to try his position to its utmost extent, let us not only put aside the constitution, act of congress, and decision of the supreme court, but let us admit that the common law does exist here; still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial:—or in other words, to give it its broadest footing, that his acts in relation to this treason are of such a nature as would make him an accessory in felony.

Being now on the general doctrine of principal and accessory, as they exist at common law, I will follow the gentleman through the whole range of his remarks on the subject, and notice some which he advanced under his first head. He said that accessories are the mere creature of the common law; hence, said he, when a statute is made in affirmance of common law or in aid of it, all common law consequences follow; as when a statute is

merely declaratory of a common law felony, whether the statute says any thing about accessories or not, they are embraced by it, because they existed in the offence at common law: but where the statute creates a new felony, not known at common law, as the statute of Henry VIII. making piracy a felony, accessories are not comprehended by it. Upon this groundwork he has built the argument that as *we* have no common law, the constitution and act of congress which define treason, stand alone; and as they merely embrace those who actually levy war and are therefore the principals, those who procure or are otherwise accessory to it, are not comprehended: and hence he concludes that the prisoner who merely brought about this treason by procurement, is not within the constitution and act of congress. This argument is perfectly characteristic of the ingenuity and subtlety of the mind which produced it; but let us try the strength of this curiously woven web. The first remarkable feature about it is, that the whole of it is an emanation of that common law, upon whose non-existence in this country the gentleman founds his conclusion. His premises are laid in the common law; and he derives from the common law of interpreting the British statutes, a principle which he applies analogically to the interpretation of our constitution; and which gives him this result, *only* upon the *postulatum* that there is no common law in the United States. But let us waive the objection, and examine his premises themselves.

First, is it true that a statute made in affirmance of common law or in aid of it, carries along all common law consequences? The book referred to by the gentleman does not prove it. 10th St. Tr. 436, which he cited as authority without producing it, is merely the argument of Hume Campbell, one of the counsel in the cause, and against whom that cause was determined. I believe, sir,

it is not usual for a gentleman citing an absent author in support of his doctrine, to refer to the argument of counsel as the opinion of the court. But admitting that the *dictum* of Hume Campbell were authority, *he* does not state the doctrine which he is cited to support. He says merely that "if a statute speaks of *matters* known at common law, it must, *as to that matter*, be construed and extended according to the common law." In support of his position, Hume Campbell cites Coke Lit. 381. Hobart 93. and 6 Mod. 148. Of these three authorities Mr. Wickham selected Hobart as auxiliary to the State Trials. Hobart is an ancient book not frequently found in modern libraries: he is not in mine; and from the abrupt manner in which this motion has been started upon us, and the extent of legal ground which it covers, I have not had time to hunt for that author through the town: whether he supports even Hume Campbell, I am, therefore, unable to say; I shall suggest a reason presently to render it probable that he does not.

The other two authorities to which he refers do not support him. Coke Littleton has nothing like it: he gives, indeed, in the page referred to, three rules for the construction of statutes; as first, that one part of it is to be expounded by another: second, that the words of an act of parliament must be taken in a lawful and rightful sense; and thirdly, *that construction must be made of a statute in suppression of the mischief and in advancement of the remedy, et qui hæret in litera hæret in cortice*. This is all he says upon the subject; and in all this we have nothing which resembles Mr. Hume Campbell's position. The other authority to which he refers, 6 Mod. 143, it is remarkable, is also the argument of counsel, sergeant Pengelly; this learned sergeant asserts, indeed, a principle which I believe to be true; but it is much more restricted and materially variant from that of Hume Campbell,

and of course still more variant from that of Mr. Wickham: speaking of the phrase *arrest of judgment* which had been used in a statute of William the 3d, as being a phrase known to the common law, he says, "when an act of parliament makes use of *such a term* generally, it shall receive the same sense that the common law takes it in, and no other;" in support of which Pengelly cites Hobart 97, 98, the very author and page cited by Hume Campbell to support his doctrine: hence I think it probable that Hobart stops at the limits given by sergeant Pengelly. The result of the investigation is, that Mr. Wickham's broad principle, that a statute made in aid or affirmance of the common law carries with it *all common law consequences*, is reduced to this: that when a statute uses a common law *phrase*, *that phrase* shall receive the same sense in the statute which it had at common law; a principle to which he is very welcome, but which will do him no manner of good—so that down comes one of the pillars which supported this air-drawn argument.

Let us examine another: "if a new felony be created by statute, no common law consequences follow." In support of this doctrine the gentleman refers to 1 Hale's P. C. 354, 5, and the authority, at first view, seems to countenance his doctrine; it requires, however, but to be more closely and extensively examined to perceive that the passage, in the light in which Mr. Wickham understands it, is not law: the passage is this, "If a man be attaint of piracy before commissioners of oyer and terminer grounded upon the statute of 28 H. 8. chap. 15, by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 H. 8. chap. 15, but this works no corruption of blood, because it is an offence whereof the common law takes no notice, and though it be enact-

ed they shall suffer and forfeit as in case of felony, yet it alters not the offence." In support of this Hale cites Co. P. C. cap. 49, page 112:—but he adds, "*vide tamen contra*" Co. Litt. sec. 745, p. 391. The passage in the latter author is thus: "There is also a felony punishable by the civil law because it is done upon the high sea, as piracy, robbery, or murder, whereof the common law did take no notice, because it could not be tried by twelve men. If this piracy be tried before the Lord Admiral in the court of the admiralty according to the civil law, and the delinquent there attainted, yet shall it work no corruption of blood nor forfeiture of his lands; *otherwise it is, if he be attainted before commissioners by force of the statute of 28 H. 8.*" Hence it appears that the common law consequence of attainder depended on the tribunal, the form of trial, and the law under which the pirate was tried; since if tried before commissioners *under the statute*, the common law consequence of attainder did follow, although the felony did not exist at common law, but was newly created by statute. Hale himself in page 355, qualifies the generality of his expressions in the passage just read. In the paragraph immediately succeeding it, he takes up the first branch of the position just read from Coke: "if a man be attainted *before the admiral* of treason or felony committed upon the sea, &c. *according to the course of the civil law*, yet it works no corruption of blood, &c. the manner of the trial being according to the course of the civil law," &c. He proceeds—"If there be an attainder of treason or felony done upon the sea, *upon this statute of 28th H. 8, according to the course of the common law, it seems that the judgment thereupon works corruption of blood; because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, &c.*

and with this agrees Co. Litt. sec. 745, page 391; nay, I think farther, that if *the indictment of piracy* before such commissioners, upon the statute of 28 H. 8, be formed as an indictment at common law, to wit, *vi et armis* and *felonice*, &c. that he might be thereupon attainted and the blood corrupted." Hence in the opinion of Hale himself, it depended upon the form of the indictment and the tribunal, whether the common law consequence of attainder, would follow a conviction for piracy on this statute. The result is, that although a statute do create a felony unknown to the common law, yet common law consequences may follow a conviction upon it; which is precisely the reverse of the position contended for by Mr. Wickham. But if this point were conceded to the gentleman as relates to *attainder*, it would not avail him; because in order to extract from the common law the rule which he applies analogically to the construction of our constitution and act of congress, he must show that when a statute creates an offence, and is silent as to accessories, no accessories are embraced by the statute. It will perplex the gentleman to show this; at all events, the research necessary to it would require more time than they have allowed us, to discover the authorities which would support the position. The doctrine upon this subject, so far as I have been able to trace it, is this; that when an act of parliament makes an offence, and says nothing of accessories, they are nevertheless embraced; although it is true that the peculiar wording of a statute may prevent that consequence. 1 Hale's P. C. 613. "It remains therefore that the business of this title of principal and accessory refers only to felonies whether by the common law, or by act of parliament.—As to felonies by act of parliament, regularly if an act of parliament enacts an offence, *though it mentions nothing of accessories before or after*, yet virtually and consequentially those that counsel

or command the offence, are accessories *before*, and those that knowingly receive the offender are accessories *after*:—Id. 614. “ Though generally an act of parliament *creating a felony* renders *consequentially* accessories before and after within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case.” Hence it is, that is from the special penning, that the statute of piracy extends only to principals, 2 Hale’s P. C. 18.—Hale 632, “ As in other felonies so in this, there are or may be accessories before and after; for though this be a felony by act of parliament *that speaks only of those that commit the offence*, yet *consequentially* and *incidentally* accessories before and after are included, *and so in every new statute making a felony* without speaking of accessories *before or after*.” The statute of 5 H. 4, cap. 4, was a statute to prohibit the multiplication of gold or silver, that is alchymy, (vide Wilson’s edition of Hale’s P. C. 644 and note *a*.) This was an offence not existing in any shape at common law, and in truth, never existing any where but in imagination. Hale in the page just referred to, speaking of this statute, says, “ And *although the statute mentions not accessories before or after*, yet this statute making the fact felony, doth *consequentially* subject accessories *before and after* to the penalty; though this be made a *quere* by Dyer 88, in Eden’s case, *yet it seems now settled according to the opinion of my Lord Coke P. C. cap. 20, that there may be accessories before and after*.” Here the authority is conclusive of the point, that although a statute create a new felony unknown to the common law, and although it says nothing about accessories, they are nevertheless comprehended as a necessary consequence or incident. I refer you also, sir, to page 704 of the same author, where the doctrine is refuted; and where on the authority of Sir Edward Coke, it is carried so far as to state, that when a

statute makes a felony and expressly comprehends accessories before the fact, being silent as to those after it, yet, notwithstanding the maxim *expressum facit cessare tacitum*, accessories after are virtually included. From this examination two conclusions are fairly deducible.

First, that when a statute creates a new felony unknown to the common law, although such statute says nothing about accessories to that felony, yet they exist and are punishable under the act.

Secondly. That accessories are *not* the mere creatures of the common law; they may derive their existence from a statute *solely*, and that by mere implication under that statute. What, then, becomes of the gentleman's nice tissue, his web so delicately put together and waving and glittering in the sun? It breaks and vanishes at the touch.

Since then accessories are not the creatures merely and solely of the common law, it makes no difference whether the common law exists here or not: accessories may nevertheless exist.

Since a statute creating an offence, impliedly embraces accessories, not by the operation of common law, but by the reason and nature of things; an American statute may impliedly embrace accessories, since whatever we may think of the existence of the common law in this country, no American, I hope, will doubt that reason and its deductions may exist here.

But let us admit for the sake of argument what is certainly disproved: that accessories are the mere creatures of the common law; and let us also admit that our constitution and act of congress do not embrace accessories: is it so very clear that we have no right to resort to the common law *in this case*, to implicate accessorial traitors. I do not, myself, think this inquiry necessary: but it may appear so to you; and I would leave no subject untouched which the court may consider as involved in the debate,

It would not be very bold in me, sir, to argue for the existence of the common law *en masse* in this country. Do not let it for a moment be understood that I meant to argue for this; I say only that it would not be very bold in me to do this; and I say so, because a majority of the federal judges, so far as their opinions have been made known, have held that opinion. In Worrel's case, cited from Dallas, the court was divided; judge Chase thought the common law in force, judge Peters thought otherwise. In a subsequent case, and that a criminal one, I mean the case of Williams, judge Ellsworth held that the whole of the common law was in full force, and even that unnatural and absurd idea that a man is for ever the subject of that country, in which it is the pleasure of his parents that he shall be born. Mr. Tucker informs us that judge Washington was also of opinion that the common law of England is in force here. These are all the opinions of which I have heard. Having thus the majority of the federal judges in favour of the opinion that the common law of England is in force here, I repeat that it would not be very bold in me standing before a federal court, to insist on the full operation of the common law together with all its consequences, and its imputed offspring, accessories among the rest. But I will not avail myself of this "vantage ground." My own opinion is a different one. I take the principle with much greater restriction, and on this head submit these reflections to the consideration of the court.

When a technical term is borrowed from any art or science, we look to that art or science to ascertain its import and signification. This is a rule of reason. It is the foundation of the principle cited by serjeant Pangelly from Hobart, that when a statute adopts a *common law term*, you take that *term* in its common law meaning. It is the foundation, too, of a paragraph in one of the most lumi-

nous and masterly state papers that ever fell from the pen of man: I mean the celebrated report of the Virginia committee in 1799, 1800, from which I beg leave to read a short extract relative our present enquiry: "Deeply impressed with these opinions, the general assembly of Virginia, instruct the senators and request the representatives from this state in congress to use their best efforts, to oppose the passing of any law founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States, excepting from such opposition, such particular parts of the common law as may have a sanction from the constitution, so far as they are unnecessarily comprehended in the technical phrases which express the powers delegated to the government; and excepting also such other parts thereof as may be adopted by congress as necessary and proper for carrying into execution the power expressly delegated." Here we find the recognition of the principle which common law phrases *takes* in the common law sense. Upon the same ground judge Iredell in the case of Fries states in effect, that the constitutional terms of *our* definition of treason being borrowed from the British statute, the framers of our constitution intended to adopt the meaning of those terms as expounded in the parent country.

Let us apply these principles. Whence do we derive the particular treason of levying war? From the British statute *immediately*; but *originally* from the common law. Sir Edward Coke in his third institute gives us a commentary on the statute of Edward III. He divides it into members and expounds each of them as he goes along:—when he comes to the words of the statute "*ou si hom eleva guerre encounter notre seignior le roy*"—if a man levy war against our lord the king, he says "this was high treason *by the common law*;"—although then the

words of our definition be derived immediately from the statute, yet as *the species of treason, levying war*, is transplanted from the common law, have we not a right to go to the fountain head, and ascertain there how much ground it covered: what was the nature of the treason, what its extent and limits? I do not speak of common law treasons at large, but this particular treason of levying war: if we have a right to go to the common law for this purpose, we shall discover that it comprehended all who were leagued in the general conspiracy, whether they themselves actually levied the war or caused it to be levied by others. I submit this idea to the court not as one which I have had time to weigh and digest; but as one which they may perhaps find not unworthy of consideration. But let me go still farther in my admissions; let me admit not only that accessories are the creatures of the common law, but also that the common law is not in force in this country, and further that our statute does not comprehend accessories: still before the prisoner can avail himself of these admissions, it must be shown that he is an accessory: or in other words, that the part which he bare in this treason is such as would *have* made him an accessory in felony. Gentlemen say that all are accessories who are not actually present at the offence: We on the contrary contend that even in inferior felonies a man may be a principal without actual presence. Let us examine this question. The law takes a distinction between actual and legal presence. A man may be legally present, although actually absent; and, even in felony, *legal* presence makes a man as much a principal as *actual* presence. I beg leave to introduce a series of cases which go to unfold and establish this distinction; and I will preface them with this remark, that you will find, in the progress of these cases, the sphere of legal presence perpetually extending itself, in proportion to the nature of the crime and the extent of theatre

which it requires for its perpetration. I proceed to lay the cases before you. 1 Hale's P. C. 439; "if divers persons come to make an affray, &c. and are of the same party and come into the same house, but are in several rooms of the same house, and one be *killed* in one of the rooms, those that are of that party and that come for that purpose, though in the other rooms of the same house, shall be said to be present." Here the house is the theatre, and it is required that those who are to be implicated as principals shall be in the other rooms of the same house. The next is the case of the Lord Dacre, stated in the same page: it is this: "The Lord Dacre and divers others came to steal deer in the park of one Pelham; Rayden one of the company killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park, it was ruled that it was murder in them all, and they died for it." Here as the park was the theatre of the meditated crime the scale of proximity is enlarged, and it was enough that the Lord Dacre and his associates were in the same park to implicate them in the guilt. The next is Pudsey's case which is thus stated, 1 Hale's P. C. 534: Pudsey and two others, viz. A and B, assault C to rob him in the highway, but C escapes by flight, and as they were assaulting him, A rides from Pudsey and B, and assaults D, out of the view of Pudsey and B, and takes from him a dagger by robbery, and came back to Pudsey and B, and for this Pudsey was indicted and convicted of robbery; *though he assented not to the robbery of D, neither was it done in his view*; because they were all there assembled to commit a robbery, and this taking of the dagger was in the mean time." Here as the highway and the whole forest were the scene of action, a still less degree of proximity was required than in either of the preceding cases, and indeed no limit of proximity is stated at all. But this case of Pudsey is irresistibly strong in another point of

view, and contains a principle which covers the case at bar completely; that principle is this: Pudsey and his colleagues were leagued for the general purpose of robbing; they went out upon this purpose; and although Pudsey was *not only absent at the particular act of robbing D, but gave no assent to that particular act*, yet he was involved in the guilt of it and suffered accordingly. The same author, page 537, contains a case which is, if possible, still stronger to the same purpose: it is the case of two men who go out for the purpose of robbing on the highway or committing a burglary; although one only commit the offence, and the other, so far from being present is actually engaged in the perpetration of a different crime at a different place, yet this other is equally involved in the offence committed by the first. Hence it is not *actual presence* which makes a principal in felony; it is merely their going forth leagued in the same general design, and the willingness to co-operate for effecting the common purpose. Foster 349, 50, thus treats the subject: "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, *and each taketh the post assigned him*: some to commit the fact, others to watch at proper distances and stations to prevent a surprise, *or to favour, if need be, the escape of those who are more immediately engaged*: They are all, provided the fact be committed, in the eye of the law present at it; *for it was made a common cause with them, each man operated in his station towards the same common end; and the part each man took, tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success*

of their common enterprise." The reason of the law is the soul of the law. What is the reason then which according to Foster, constitutes this legal presence? It is, that the cause is a common cause; that each man operates in his station towards the same common end; that the part each man takes, tends to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise. Whosoever, in any crime, performs a part within this description, is legally present and a principal in that crime. Foster proceeds; "I will not here multiply cases upon the head of constructive presence. This may be sufficient by way of illustration. Others *founded in the same principle of mutual concert, aid and protection*, will fall in, in their proper places." In page 353, 4, he keeps his promise. "A general resolution against all opposers, whether such resolution appeareth upon the evidence to have been actually and explicitly entered into, or may be reasonably collected from their number, arms, or behaviour at or before the scene of action; such resolutions so proved have always been considered as strong ingredients in cases of this kind. And in cases of homicide committed in consequence of them, every person *present in the sense of the law*, when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow. The case of Lord Dacres mentioned by Hale, and of Pudsey reported by Crompton and cited by Hale, turned upon this point. The offences they respectively stood charged with as principals, *were committed far out of their sight and hearing*; and yet both were holden to be present. *It was sufficient that at the instant the facts were committed, they were of the same party and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those who did the facts.*"

Let us apply the reasoning and principles of those cases to the case at bar. In order to do this with propriety, we must consider the nature of the crime charged upon the prisoner: the theatre requisite for its perpetration and the various parts to be performed in promotion of the general purpose. The charge in the indictment is treason in levying war against the United States; the objects imputed to the prisoner are the seizure of Orleans and the separation of the states. We shall make a mistaken application of the doctrines just investigated, if we apply them to the overt act on Blannerhasset's island. That assemblage was not the object, the end, the catastrophe and consummation of the treason; it was a mere transient and incidental effect of it. At the time then of this assemblage we are to consider the prisoner's local position, not in reference to the assemblage, but to the general and grand object of the treason; not in reference to the island, but to the great theatre which the treason required and on which it was acting, from New York to Orleans. The gentlemen on the other side will not complain of this as a new idea. Mr. Wickham himself urged it and reiterated it for a different purpose, that the overt act was not the treason but merely evidence of it. When then, in the language of the cases just read, we enquire whether the prisoner and the men on the island were of the same party and upon the same pursuit, the question relates not to the island, which was certainly not their pursuit, but to the great and splendid purpose of seizing Orleans, and rending the union forcibly asunder; and in this light *they were of the same party and upon the same pursuit*; in this light they were "*under the same engagement and expectation of mutual defence and support; it was a common cause with them, each man operated in his station, at one and the same instant, towards the same common end, and the part each man took, tended to give countenance, encouragement and protection to the whole*

gang, and to ensure the success of the common enterprise." so that within every reason and principle assigned for the constitution of legal presence, they were all equally present. What though the prisoner gave no express assent to the particular meeting on the island; neither did Pudsey in the case cited, assent to the particular robbery of D by A; but the purpose of Pudsey and A was the same common purpose which involved them in the same common guilt. So the purpose of the prisoner and the men upon the island was a common purpose, and therefore their guilt is the same. The part, therefore, which the prisoner has in this transaction, is such an one, as in the case of felony would make him a *principal* and not an *accessory* as the gentlemen contend.

The result is in perfect harmony with the decision of the supreme court in the case of Bollman and Swartwout. Then we have seen that remoteness from the scene of the treason makes no odds: it is the being leagued in the same common cause, and co-operating towards the same general purpose which gives to each man a legal presence although thousands of miles off, and makes him as much a principal as those who are actually present.

Having ascertained that the prisoner can in no view of *the law* be considered as an accessory in this case, let us enquire whether he can be so considered in reason.

A plain man who knew nothing of the curious transmutations which the wit of man can work, would be very apt to wonder by what kind of legerdemain Aaron Burr had contrived to shuffle himself down to the bottom of the pack as an accessory, and turned up poor Blannerhasset as a principal in this treason. It is an honour, I dare say, for which Mr. Blannerhasset is by no means anxious; one which he has never disputed with Col. Burr, and which I am persuaded he would be as little inclined to dispute on this occasion as on any other. Since, however,

the modesty of Col. Burr declines the first rank and seems disposed to force Mr. Blannerhasset into it in spite of his blushes, let us compare the cases of the two men and settle the question of precedence between them. It may save a good deal of troublesome ceremony hereafter.

In making this comparison, sir, I shall speak of the two men and of the part they bore as I believe it to exist and to be substantially capable of proof: although the court has already told us that as this is a motion to exclude *all* evidence, generally, we have a right, in resisting it, to *suppose* the evidence which is behind, strong enough to prove any thing and every thing compatible with the fact of Burr's absence from the island. If it will be more agreeable to the feelings of the prisoner to consider the parallel which I am about to run, or rather the contrast which I am about to exhibit, as a fiction, he is at liberty to do so; I believe it to be a fact.

Who then is Aaron Burr, and what the part which he has borne in this transaction? He is its author; its projector; its active executor. Bold, ardent, restless and aspiring, his brain conceived it; his hand brought it into action. Beginning his operations in New York, he associates with him, men whose wealth is to supply the necessary funds. Possessed of the main spring, his personal labour contrives all the machinery. Pervading the continent from New York to New Orleans, he draws into his plan, by every allurements which he can contrive, men of all ranks and all descriptions. To youthful ardor he presents danger and glory; to ambition, rank and titles and honours; to avarice, the mines of Mexico. To each person whom he addresses, he presents the object adapted to his taste; his recruiting officers are appointed; men are engaged throughout the continent; civil life is indeed quiet upon its surface; but in its bosom this man has contrived to deposit the materials with which the slightest touch of his

match produces an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806 he goes forth for the last time to apply this match. On this excursion he meets with Blannerhasset.

Who is Blannerhasset? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shows that war is not the natural element of his mind; if it had been, he would never have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr. Blannerhasset's character, that on his arrival in America, he retired even from the population of the Atlantic states, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and "lo, the desert smiled." Possessing himself of a beautiful island in the Ohio, he rears upon it a palace and decorates it with every romantic embellishment of fancy. A shrubbery that Shenstone might have envied blooms around him; music, that might have charmed Calypso and her nymphs, is his; an extensive library spreads its treasures before him; a philosophical apparatus offers to him all the secrets and mysteries of nature; peace, tranquillity and innocence shed their mingled delights around him; and to crown the enchantment of the scene, a wife, who is said to be lovely even beyond her sex and graced with every accomplishment that can render it irresistible, had blessed him with her love, and made him the father of her children. The *evidence* would convince you, sir, that this is only a faint picture of the real life. In the midst of all this peace, this innocence, and this tranquillity, this feast of the mind, this pure banquet of the heart—the destroyer comes; he comes to turn this paradise into a hell—yet the flowers do not wither at his approach and no monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon

him. A stranger presents himself. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not a difficult one. Innocence is ever simple and credulous; conscious of no designs itself, it suspects none in others; it wears no guards before its breast; every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden, when the serpent entered its bowers. The prisoner in a more engaging form, winding himself into the open and unpractised heart of the unfortunate Blannerhasset, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuses into it the poison of his own ambition; he breathes into it the fire of his own courage; a daring and a desperate thirst for glory; an ardour panting for all the storms and bustle and hurricane of life. In a short time the whole man is changed, and every object of his former delight relinquished. No more he enjoys the tranquil scene: it has become flat and insipid to his taste: his books are abandoned; his retort and crucible are thrown aside; his shrubbery blooms and breathes its fragrance upon the air in vain; he likes it not: his ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar: even the prattle of his babes once so sweet no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unfelt and unseen. Greater objects have taken possession of his soul—his imagination has been dazzled by visions of diadems, and stars and garters and titles of nobility: he has been taught to burn with restless emulation at the names of Cromwell, Cæsar and Bonaparte. His enchanted island is destined soon to relapse into a desert; and in a

few months we find the tender and beautiful partner of his bosom, whom he lately "permitted not the winds of" summer "to visit too roughly," we find her shivering, at midnight, on the winter banks of the Ohio, and mingling her tears with the torrents that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness—thus seduced from the paths of innocence and peace—thus confounded in the toils which were deliberately spread for him, and overwhelmed by the mastering spirit and genius of another; this man, thus ruined and undone, and made to play a subordinate part in this grand drama of guilt and treason; this man is to be called the principal offender; while he, by whom he was thus plunged and steeped in misery, is comparatively innocent—a mere accessory. Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd; so shocking to the soul; so revolting to reason. O! no, sir. There is no man who knows any thing of this affair who does not know, that, to every body concerned in it, Aaron Burr was as the sun to the planets which surround him; he bound them in their respective orbits, and gave them their light, their heat and their motion. Let him not then shrink from the high destination which he has courted; and having already ruined Blannerhasset in fortune, character and happiness for ever, attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Upon the whole, sir, reason declares Aaron Burr the principal in this crime, and herein confirms the sentence of the law.

Before I conclude this point, I beg leave to notice some remarks of Mr. Wickham's on the act of congress, touching crimes against the United States, and which I omitted in the proper place. He says that congress were aware that the common law was not in force here, and consequently

that accessories, who are the creatures of the common law, would not be embraced by an act creating a felony in general terms: he infers this from their having prescribed the punishment of accessories in the case of piracy, and those who rescue after conviction of treason. I will make this remark upon the act of congress; whenever it mentions accessories to any crime, it is for the purpose of distinguishing between the guilt and consequently the punishment of accessories before and after the fact. I mentioned before, the line which reason had drawn between them. Congress has observed this line. Accessories before the fact in piracy, are punished with death: those after it by fine and imprisonment. The 23d sec. of that act is confined merely to the case of rescues after acquittal, and its objects is simply to keep the course of justice clear. Congress knew that in treason, all were principals from the nature of the crime, and that it was therefore unnecessary to implicate them in detail by a special act.

From what has been said I trust it is clear both in law and reason, that Aaron Burr did not derive his guilt from the men on the island, but imparted his own guilt to them; that he is not an accessory in the crime, but a principal; and therefore that there is nothing in the objection which demands a record of *their* conviction before we shall go on with our proof against *him*.

But admitting, what is scarcely possible, that the court shall think otherwise, and shall deem Aaron Burr an accessorial offender in the treason, can you for this, shut out the evidence from the jury? The indictment does not charge Aaron Burr as an accessory; but as a principal. Whether he is a principal or not is the question of *fact* which the jury is sworn to decide. Will you, because of *your* impressions of this fact, from a partial view of the evidence, compel them to decide also upon that partial view? If you do, do you not thereby divest the jury of

their proper and peculiar functions? The province of the jury must not be invaded, sir; the invasion is big with danger and terror. I trust that you will see this subject in the awful light in which it really stands, and that you will suffer the trial to take its natural course.

The fourth and last objection to the admission of our evidence is this: "That no evidence is relevant to connect the prisoner with others, and thus to make him a traitor by relation, until we show an act of treason in those others; and the assemblage on the island was not an act of treason."

The question which the court is here called on to decide, is, whether the assemblage on Blannerhasset's island was a levying of war. The gentlemen who hold the negative of this position must admit that the intention of that assemblage was a treasonable one; or else we cannot be debarred from proving it. They must admit that the individuals who composed that assemblage were enlisted by Aaron Burr, or by his subaltern officers; that they had marched by individuals to the mouth of Beaver, a place of partial rendezvous: that when collected there, they proceeded to Blannerhasset's island, another place of rendezvous; where they were to receive an accession of boats, men, provisions, arms, and ammunition, under the command of Blannerhasset himself: that from the island they proceeded to the mouth of Cumberland, a place of general rendezvous for the expected forces from the east, and from the states of Virginia, Kentucky, Ohio and Tennessee; that at the mouth of Cumberland they took in their commander in chief, the prisoner at the bar, with a considerable addition of men and arms, and proceeded to Baton Rouge, attempting the seduction of the officers and men at the several forts and garrisons of the United States, as they passed; which forts and garrisons were too weak to have resisted their passage with effect;

that expecting the co-operation of the United States' troops, the project was to seize upon New Orleans, together with its bank, shipping, military stores, &c. to plant the standard of treason and a separate empire in that city, and to rend from the nation all that portion of territory which lies west of the Allegany. All this they must admit, for this and more we are prepared to prove. The question then is, whether, all these things admitted, the assemblage on the island was an overt act of levying war.

Here we are brought back to the constitution and act of congress; and the inquiry is, what is *levying* war? Gentlemen on the other side speaking on this subject, have very artfully dropped the word *levying* altogether. "Show us your open act of war" they exclaim; "*hard knocks*," says Mr. Lee, "are things we can all feel and understand; where are the hard knocks?" "Where was this bloody battle, this bloody war?" cries Mr. Martin. No where, gentlemen; there was no bloody battle, there was no bloody war. The energy of a despised and traduced government prevented that tragical consequence. In reply to all this blustering and clamour for blood and havoc, let me ask calmly and temperately, does our constitution and act of congress require them? Can treason be committed by nothing short of actual battle? Mr. Wickham, shrinking from a position so bold and indefensible, has said that if there be not *actual* force, there must be at least *potential* force—such as terror and intimidation struck by the treasonable assemblage. We will examine this idea presently. Let us at this moment recur to the constitutional definition of treason, or to so much thereof as relates to this case. "Treason against the United States shall consist only in *levying war* against them;" not in *making* war; but in *levying* it. The whole question, then, turns on the meaning of that word, *levying*.

We know that our's is a motley language; variegated

and enriched by the plunder of many foreign stores. When we derive a word from the Latin, the Greek, or any other foreign language, living or dead, philologists have always thought it most safe and correct to go to the original language for the purpose of ascertaining the precise meaning of such word. *Levy*, we are told by all our lexicographers, is a word of French origin: It is proper therefore that we should turn to the dictionaries of that language to discover its true and real meaning; and I believe we shall not find that when applied to war, it ever means *to fight*, as gentlemen on the other side would have us to believe. Boyer's Dictionary is before me, sir; and I am the more encouraged to appeal to him, because in the case of Bollman and Swartwout, your honour, in estimating the import of this very word, thought it not improper to refer to the authority of Dr. Johnson. "*Lever*," the verb active, signifies, according to Boyer, "to lift, heave, hold or *raise up*." Under the verb he has no phrase applicable to our purpose; but under the substantive, *levée*, he has several; I will give you them all.

Levée d'un siège; the raising of a siege. *Levée des fruits*; gathering of fruits, crop or harvest.

La levée du parlement Britannique; the raising or recess of the British parliament: *Levée* (collète de deniers) a levying, raising, or gathering: *Levée de gens de guerre*, *levying*, *levy*, or *raising of soldiers*: *Faire des levées de soldats*; *to levy or raise soldiers*: so that when applied to fruits or taxes, it means *gathering* as well as *raising*; when applied to soldiers it means *raising* only; not *gathering*, *assembling*, or *bringing them together even*; but merely *raising*. Johnson takes both these meanings as you mentioned, in the case of Bollman and Swartwout; but in the original language we see that *levying*, when applied to soldiers, means simply the *raising* them, without any

thing farther: in military matters, *levy* and *raising*, if Boyer may be trusted, are synonymous.

But to ascertain still more satisfactorily the meaning of this word *levy*, let us look to the source from which we have borrowed the whole definition of treason: the statute of the 25 E. 3. That statute is in Norman French, and describing the treason of levying war, uses these words, "*si home leve de guerre contre noster seigneur le roy en son royaume.*" In a subsequent reign, I mean the factious and turbulent reign of Richard II. when the statute of Edward, although unrepealed, was forgotten, lost and buried under the billows of party rage and vengeance, it became at length necessary for parliament to interfere and break to pieces the engine of constructive treason; and in the 21st year of Richard II. a statute was passed which may be considered as a parliamentary construction of that of Edward III. In that statute the treason of levying war is thus explained, "*celuy que levy le people and chivache en counter le roy a fair guerre deins son realme.*" Here the French verb, *leve*, is the same as that used in the statute of Ed. with an unimportant orthographic variation; and here, it is clearly contradistinguished from the actual war:—the *levy* is of *men and horses, for the purpose of making war*; and the *levy* would have been complete, although the *purpose* had never been executed: I consider, therefore, the statute of Richard as not only adding another authority to that of Boyer to prove that the extent of the French verb *leve*, when applied to soldiers, goes no farther than the *raising* them; but I consider that statute also as a parliamentary exposition or glossary of the phrase *leve de guerre* in the statute of Edward. In the latter opinion I am supported by 1 Hale 85, who speaking of the statute of Richard says "these four points of treason" settled by the parliament of Richard, "seems to be *included* within the statute

of 25 E. 3. *as to the matter of them*, with these differences.

1. The forfeiture is extended further than it was formerly, namely to the forfeiture of estates tail and uses. 2. Whereas the ancient way of proceeding against commoners, was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 Ed. 3. required an overt act to be laid in the indictment and proved in evidence, this hath no such provision." These are all the differences which he takes between them.

Hence it is clearly the opinion of Hale that the treason of levying war is *materially* the same in both statutes. For if the statute of Edward required *actual war, hard knocks, bloody battles*, to constitute treason, while that of Richard made the *mere preparation* for those purposes treason, would it, could it have escaped such a mind as Hale's; more particularly when he was especially employed in discriminating between the two statutes, and marking the points of difference, to the disadvantage of the statute of Richard. If nothing short of actual war will satisfy the statute of Edward, while that of Richard covers so much more ground as to comprehend the first act of recruiting, and to make that treason, how can the former be said to include the latter? It might with as much propriety be said, that a field of battle includes the kingdom within which it lies, or that the less includes the greater. Yet of this absurdity Hale has been guilty unless it be conceded that the statutes of Richard and of Edward are materially the same: if in conformity to the opinion of Hale, this point be conceded, then as it is indisputably clear and certain that the statute of Richard makes levying of war to consist in the preparations for that war, in the raising of men, horses, &c. for the purpose of making war; then also under the statute of Edward, levying war means the

preparations for that war. And if this construction of the statute of Edward be admitted, we have but to remember that our definition of treason is borrowed from this statute, and to ask whether the same words, *levying war*, in the English and American statutes mean the same thing.

Confiding in the candour of this investigation and in the truth of the conclusion to which it has led me, I should myself have thought the mere enlistment of soldiers, of itself, an overt act of levying war. I should myself think such enlistment too, sufficient to satisfy *the reason* of the statute of Edward, and consequently that of our constitution and act of congress in requiring an overt act to be proven. What is the reason avowed by all the books?—It is, because the secret intentions of the man lie beyond the ken of mortal sight. They can be known only to the man himself, and to that Being whose eye can pierce the gloom of midnight, and the still deeper gloom that shrouds the traitor's heart. To his fellow men those intentions can be manifested only by some external or overt act: I consider the phrase *overt act* as intended to be in contrast with *secret intention*; but whenever this secret intention ripens and breaks out into an act, of which the human senses can take cognizance, I consider the reason of the law as being satisfied; we are then relieved from the necessity of prying into and guessing at the secrets of the heart. It is not pretended that any case ever occurred to contradict this idea until the case which is reported by Ventris; which has been said by some modern English writer, and pronounced by your honour to settle the principle that the mere enlistment of soldiers is not sufficient to constitute the levying of war. Permit me, with the utmost deference and respect for your honour, to examine that case, and see whether it justifies a conclusion so broad. That case it is to be observed is adjudged under the statute of the 25 Ed. 3. Now it re-

quires but to adopt for a moment the idea which I have shown to be sanctioned by Lord Hale, that the statute of Richard explains by a paraphrasis the more condensed definition of that of Ed. to perceive the reasoning and whole scope of the case in Ventris:—"If a man," says the statute of Ed. "shall levy war against our lord the king *in his realm*." "or he," says the statute of Richard, "who levies men and horses, against the king, *to make war in his realm*." The *levy*, then, is a totally different thing from the *war*, the *levy* is the *preparation*; the *war* is the *purpose*; but it is "to make *war in his realm*." Wheresoever then the *levy* is made, the *purpose* must be to make *war in the realm*. Hence it is very clear that although the levying should be within the realm, the statute would not be satisfied, *unless the purpose* also was to make *war within the realm*. It is upon this latter point alone that the case in Ventris turns, and not upon the scene of the enlistment, nor the insufficiency of the fact of enlistment.—The case in Ventris is that of Patrick Harding, 2 vol. 315, 16. The charge in the indictment is compassing the death of the king and queen (William and Mary) and the overt act laid is *levying war* by raising divers soldiers and men armed and *to be armed* (*armatos et armaturos*) "et milites sic ut præfertur levatos *extra hoc regnum Angliæ* misit et iter secum suscipere procuravit ad sese jungendos aliis hostibus," &c. the special verdict finds that the prisoner did "list, hire, raise and procure sixteen men, subjects of this kingdom, at the time, &c. and those sixteen men so listed, hired, raised and procured, *did send out of this kingdom*, into the kingdom of France to assist and aid the French king," &c.—"Upon this special verdict found, the Lord Chief Justice, justice Gregory, and justice Ventris, who were then present at the sessions, conceived some doubt; for they were of opinion that it did not come within the clause of

the statute of 25 Ed. *of levying war*: for that clause is, if a man levy war against our sovereign lord the king *in his realm*; and by the matter found in the special verdict it appears that these men were listed and sent beyond sea to aid the French king." In the original report the words *in his realm* are printed in Italics, as marking the particular part of the statute on which the opinion rested. But suppose the purposed war had been *within* the realm: is not the implication from the reasoning of the court irresistible, that the enlistment would have been a sufficient overt act of levying? Is it not clear that the court in this case considered the statute of Edward as explained and expounded by that of Rich. II: that they distinguished between *the levy* and *the war*, and required according to the express letter of the second statute that not only the preparation, but the *purposed war* should be *within the realm*? But it has been said that if the enlistment had been a sufficient overt act of levying war, then war had been levied within the realm. But this is confounding the levy with the war, the means with the end, the preparation with the purpose: it is losing sight of the requisition of the statute that not the levy merely, but the intended war shall be within the realm. Besides when the court *avow* the reason of their opinion; when they declare it to consist (not in the insufficiency of the fact of preparation, but) in the fact that the proposed war was to be *out of the realm*, with what propriety can it be argued that their opinion rested, not on the reason which they themselves avow, but on one which they do not avow, and which they disapprove as far as they can do it by implication? If it was immaterial *where* the war was to be, if the enlistment of men was in itself insufficient as an overt act of levying war, why did not the court take this ground at once and say that the mere enlistment of men was not an overt act of levying war? The answer is obvious; it

was because they considered the statute as requiring that the purposed war should be within the realm; whereas the war as found by the jury was intended to be out of the realm; and to my judgment, the inference is equally obvious that if the war had been found to be intended within the realm, the court would have had no doubt that the war had been levied by the enlistment. The case in *Ventris* therefore is so far from warranting the conclusion that the mere enlistment is not a sufficient overt act of levying war, that in my conception, it warrants the conclusion that it is a sufficient act. And if the case in *Ventris* does not justify that doctrine that enlistment is insufficient as an overt act, I defy the gentlemen to produce a case, *not dependant on that*, which does warrant it. But let me yield the authority of this case, let me admit it to prove what it has been supposed to prove, still it impairs the etymology of the word *levying*, no farther than this, that raising men only is not levying war. How far then are we to carry the meaning of this word *levy*? Shall we add the other meaning of the word in the original language, and say that the men must not only be raised, but they must be brought together or assembled? Be it so; and I contend that neither the courts of this country nor of England have ever required more than *an assemblage* of men with treasonable intent; whether they be armed or unarmed; whether they use force or not; whether their numbers be great or small; still, according to authority, the treason is complete.

Arms are not necessary. Whenever the English books have appeared to require them, it will be found, on examination, to be in the statement of some hypothetic case, *where the overt act is to contain, within itself, evidence of the treasonable intent*: but whenever *the treasonable intent* can be proved by evidence *extrinsic of the overt act*, arms have never in any case been required. 1 Hale 131, for

example, puts these cases: "As where people are assembled in great numbers armed with weapons offensive or weapons of war—if they march thus armed in a body—if they have chosen commanders or officers—if they march cum vexillis explicatis, or with drums or trumpets or the like."—In all these cases there is not a word of extraneous evidence of the treasonable intent:—but that intent was to be found in the appearance and warlike array of the assemblage itself. Mr. Dallas, whose legal opinions are certainly entitled to very high respect, when he was of counsel for John Fries, and was consequently not interested in extending the doctrine of treason, admitted the distinction which I have here taken. In page 103 of Fries's Trial he is reported to have said—"As on the one hand I grant that the *circumstance of military array* is not *necessary* to an act of treason, *if the intention is traitorous*, so I insist on the other hand that the circumstance of military array will not constitute treason, without such intention." In this he is supported by all the English authorities. Lord Hale, who seems more than any other writer or judge to narrow the doctrine of treason, no where says that arms are necessary. Speaking of the difficulty of defining what constitutes levying war, he says it is commonly *expressed* by the words *modo guerrino arraiati*, 1 Hale's P. C. 131, that is, in treating generally of the subject or describing the offence in indictments it is so commonly *expressed*; and in this light he is understood by Foster 208. So far indeed is Lord Hale from requiring military array, that by the strongest implication he declares it unnecessary.—"Again, the actual assembling of many rioters in great numbers to do unlawful acts, if it be not *modo guerrino* or *specie belli*, *as if they have no military arms nor march nor continue in the posture of war*, may make a great riot, yet doth not *always* amount to a levying of war." What is the candid inference from

this passage? that *sometimes* such an unarmed assemblage, without the warlike array or the show of war, *may* amount to a levying of war; for if this be not the inference, the word *always* used by Lord Hale has no signification whatever. I affirm that no case can be produced to show arms to be necessary; that no description of an overt act in which arms form a necessary ingredient can be adduced, unless when the overt act is itself to afford the only evidence of the design: nor can even the *dictum* of an elementary writer be adduced to prove that arms are necessary. That on the contrary every writer and every judge who has had occasion to mention the subject directly, has declared arms to be unnecessary, if the intention can be otherwise proven. "I do not think," says Foster 208, "any great stress can be laid upon this distinction, (being armed or unarmed.) It is true that in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner; and where the case would admit of it, the other circumstances of swords, guns, drums, colours, &c. have been added. But I think the merits of the case have never turned singly on any of these circumstances."

"In the cases of *Damaree* and *Purchase*," he continues, "which are the last *printed* cases which have come in judgment on the point of constructive levying war, there was nothing *given in evidence* of the usual pageantry of war; no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoner's counsel insisted much on that matter." In the same paragraph he adds what confirms Mr. Dallas's distinction.—"The *true criterion* in all these cases is, *Quo animo* did the parties assemble." East, in his crown law, page 67, collects the authorities together, and proves the truth of Foster's positions, that arms or military array are unnecessary; and that the intention is

the *criterion*. Judges Chase, Iredell, and Foster expressly declare themselves of Foster's opinion. I beg leave to read a short paragraph from judge Chase's charge to the jury on the trial of Fries, 197. "The court are of opinion that military weapons (as guns and swords mentioned in the indictment) are not necessary to make such insurrection or rising amount to levying war; because numbers may supply the want of military weapons, and other instruments may effect the intended mischief: *The legal guilt of levying war may be incurred without the use of military weapons or military array.*" I think I may now consider it as proven that arms are not necessary to the constitution of treason. Since then *no arms were necessary* to make the assemblage on the island a treasonable assemblage, it is scarcely worth while to notice Mr. Wickham's observation that the rifles which are proven to have been in the hands of the men there, are not necessarily military weapons. I suspect, however, that there may yet be those living in Great Britain who remember the name of general Morgan, and who can bear witness that a rifle in the hands of a back-woodsman of America is a military weapon emphatically, and as formidable a one too as a soldier need wish to encounter.

But we are told if *arms* be not necessary, *force is necessary* to make an assemblage treasonable: let us now inquire if this be so.

On this branch of the enquiry I beg leave to premise that in the several cases on this subject, the word *force* is generally used figuratively; intended to signify the assembled body and not any deed of violence actually committed by them: thus in Vaughan's case it is stated that he came with an *armed force*; and in the opinion of the presiding judge of this court, in the motion to commit the prisoner in March last, we also find this word used in this figurative sense—page 33: after saying it is clear that an

intention to commit treason is an offence entirely distinct from the actual commission of that crime, the judge proceeds, "War can only be levied by the employment of *actual force*. Troops must be embodied; men must be assembled in order to levy war." The troops then being embodied, the men being assembled, war is thereby levied; force is employed; not that a blow is actually struck; but that there is a body capable of using force, if they please to use it. Sir, as to the demand of actual violence, there is not an English authority which countenances it; they concur in disclaiming it. They take the distinction between the *bellum levatum* and the *bellum percutsum*: thus Foster 218,—“An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum* although not *bellum percutsum*. *Listing and marching are sufficient overt acts without coming to a battle or action.*” 1 East, 67, repeats this doctrine, and cites various cases in support of it. Salkeld's Reports, 635—“there may be levying war without actual fighting.” Same case, 5 St. Tri. 37. There is not a single English authority which requires force, that is actual violence, or the *bellum percutsum*: the assemblage and clear evidence of the treasonable design have always been held sufficient. The case of Purchase has been erroneously stated from the bar. That case did not turn upon the question of force or no force; the difficulty in his case arose from this circumstance; it appeared that Purchase knew nothing of the designs and motives of the rising: it was questioned therefore whether the act of others could be imputed to him. This is proven by the original trial itself; and so Foster, 215, considers it. “With regard to Purchase there was some diversity of opinion among the judges present at his trial, because it did not appear upon the evidence that he had any concern in the original rising, or was present at the pulling down any of the houses, or

any way active in the outrages of the night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident for aught appeared to the contrary;" but suppose he had been concerned in the original rising, or had been present at the pulling down the houses and encouraged it by his voice; would there have been any doubt? The reasoning of the case shows that there would not: and even as it was, although three of the judges *doubted*, the majority of them agreed in his guilt and he was condemned accordingly. The case in *Kelying*, 75, on which the gentleman so much relies to prove the necessity of force, is one of those cases in which the treasonable intent is only manifested by the employment of force and the extent to which it is carried. It was the case of a riot, a sudden ebullition of popular passion preceded by no concert, no arrangement, and a case therefore in which the intent was unsusceptible of proof, except by the acts of the mob. It was a case, I will add, in which any kind of force would not have been sufficient to make it treason; for if they had stopped with pulling down one bawdy house, or opening one prison to let out a favourite prisoner, that would have been a riot merely; they continued however, together, and in action for two days, and showed by the extent and nature of the violence which they practised, that their intent was general and universal. From such a case surely nothing can be inferred which will fairly apply to a case so different as that at bar: a case in which there was a previous concert and arrangement, and a case in which the *quo animo*, the criterion of the crime, is susceptible of proof independent of the assemblage. Let us come now to our own country and see if our adjudications require actual force. Before I proceed to the examination of Fries's case, let me remind you of an observation of Mr. Randolph's, equally elegant and true; "an elementary principle resulting from the circum-

stances of a particular case, and to be found in that single case only, should never be applied except to a case parallel in its circumstances." Nothing can be more just than this remark; and it is by violating the rule which it contains, that so much jarring, so much irreconcilable discord, so much Babylonian confusion is seen to exist among our cases. With this remark let us come to the trial of Fries. What was the circumstances of that case? There had been actual violence; it was also a disorganized and disorderly riot, and the reasoning of the British cases applied to its character. But as there had been violence in that case, and the judge in charging the jury was giving a description of treason adapted to the case at bar, what was more natural than for him to introduce that feature of the case into his description. It will be found that judge Chase considers the case of Fries as a riot, and reasons upon it in that point of view, applying to it all the English doctrine of riot, where violence, as before remarked, is the only evidence of treasonable intent. But if each *dictum* of the judge in delivering that charge is to be considered as an abstract truth, it will be easy to find in that charge the clearest indications of his opinion that violence is not necessary. Thus in page 196, "It is the opinion of the court that any insurrection or rising of any body of people within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution." Here it is not the *actual attainment of the object, by violence*, which is declared to constitute the treason; it is the rising *for that purpose*; and in this supposed case nothing is found but the assemblage and the treasonable purpose or intent. In the succeeding paragraph he repeats the same opinion. In the next he declares military weapons unnecessary;

then proceeds with the more particular doctrines of riots; as that the purpose must be general or universal; not private or personal. The intention he says is the true criterion of the offence. The next comes a paragraph which has been much relied on: "The court are of opinion that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution *by force*, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime; whether by one hundred or one thousand persons is wholly immaterial." I understand the word *force* here, to be used in its figurative sense; that it is used as contrasted with the conspiracy or meditation of the treason; that it is used to signify the body assembled for the purpose of carrying that conspiracy into effect; hence it is, that in the concluding member of that paragraph, he speaks of the number so assembled, or what he calls *the quantum of the force*, declaring it to be immaterial whether by one hundred or one thousand. In the next paragraph he maintains the same idea, concluding that paragraph with these words, "*but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.*" He proceeds to state that this opinion is in substance the same with the opinion of the circuit court in 1795, in the case of Vigol and Mitchell. Now in the case of Vigol, 2 Dall. 347, the court give no absolute opinion; the opinion is rigidly confined to the circumstances of that case, in which the judge states, there were acts of violence and devastation. But in the case of Mitchell, *id.* 356, the judge, Patterson, commenting on the circumstance of its not being sufficiently proven, that the prisoner was

at General Nevill's house, where the violence was used, speaks thus:—"He is proved by a competent number of witnesses to have been at Couches Fort. At Couches Fort the conspiracy was formed for attacking Gen. Nevill's house, and the prisoner was actually passed on the march thither. Now in Foster, 213, the very act of marching is considered as carrying the traitorous intent into effect." In a subsequent part of his opinion, speaking of the conspicuous figure which the prisoner had made, the judge uses these explicit words: "His attendance armed, at Braddock's field, would *of itself* amount to treason, if his design was treasonable." So that if judge Chase's opinion be, as he professes, *substantially* the same with this of judge Patterson's, then a deed of violence is not necessary, but the assembly and treasonable intent are enough. Judge Chase sums up his opinion in these words: "If from a careful examination of the evidence, you shall be convinced that the real object and intent of the people assembled at Bethlehem, was of a public nature, (which it certainly was if they assembled with intent to prevent the execution of both the above-mentioned acts of congress or either of them) it must then be proved to your satisfaction that the prisoner at the bar incited, encouraged, provided, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by means of intimidation and violence, the execution of both the above-mentioned acts of congress or either of them; and that some force was used by some of the people assembled at Bethlehem." But for these concluding words the opinion of the judge would have resulted merely in requiring what Mr. Wickham calls *potential force*; the last words may well be accounted for from the particular circumstance of this case in which there was actual violence; and I will venture to affirm that it is the only case

in which a deed of violence ever was declared necessary when the assemblage and treasonable intent could both be made out by proof independent of any such deed. If there be another let it be shown. If this case stands alone, why will you make this principle an abstract and general one; since in the language of Mr. Randolph it results from the circumstances of this particular case and can be found in this case only. I have shown that in England the distinction is clearly settled between the *bellum levatum* and the *bellum percutsum*; and that there war may be levied although no blow be struck; I will now show that by the authority of a court of this country superior to that in which judge Chase sat, it has been in substance declared again and again, that war may be levied without battle; that the assemblage with a treasonable intent *completes* the crime of levying war; you will know, sir, that I am referring to the opinion of the supreme court in the case of Bollman and Swartwout. In that case, page 39, 40, the court commences the declaration of its opinion:—

“Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”

“To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation *by the assemblage of men for a purpose treasonable in itself*, or the fact of levying war cannot have been committed.”

Is there any requisition of force here? Is it said that the conspiracy must be brought into operation by the assemblage of men for a purpose treasonable in itself, *and*

by deeds of force and violence, or the fact of levying war cannot have been committed? No, sir, it is *the assemblage of men for a purpose treasonable in itself*, which alone is declared sufficient to make the fact of levying war. "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, *if war be actually levied*, that is, *if a body of men be actually assembled for the purpose of effecting, by force, a treasonable purpose*, all those who perform any part, however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be *an actual assembling of men for the treasonable purpose*, to constitute a levying of war." Here force is mentioned; but how is it mentioned? Merely as the ultimate purpose of the assemblage: the means by which they intend to execute their treasonable design: So in the assemblage on the island their object was the seizure of Orleans; they intended to effect that purpose by force: there was then a body of men actually assembled; and the purpose which brought them together, and which they were going to effect by force, was a treasonable purpose. "To *complete* the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design." Here an actual assemblage of men for the purpose of executing a treasonable design is declared to *complete* the crime of levying war: not a word of force or deeds of violence; yet the crime is *completed*. The court profess to be enumerating the ingredients which taken together would make this crime; and conclude the enumeration by stating that that would *complete* it, yet it is pretended by the gentlemen on the other side that the great ingredient of force and violence not enumerated by the court is necessary to its completion. "In the case now before the court, a de-

sign to overturn the government of the United States in New-Orleans by force, would have been unquestionably a design which if carried into execution would have been treason, and the assemblage of a body of men *for the purpose* of carrying it into execution, would *amount* to levying war against the United States, but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." Here again the court declare that the assemblage for the treasonable purpose would *amount* to levying war; well, if that would amount to levying war, it required nothing else to make it amount to it; yet gentlemen persist in saying it did require something else, as deeds of violence, to make the assemblage an act of levying war, or what is bolder still, that these deeds of violence were required by the opinion of that court. In other words, that while the court was perpetually and uniformly saying one thing, they as uniformly meant a totally different one.—Let us proceed with the opinion. "If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States, in any of their territories, was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the *assemblage of a body of men to effect it* would be levying war against the United States."

"But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution *by an open assemblage of men* for that purpose, previous to the arrest of the prisoner, in order *to consummate* the crime as to him; and a majority of the court is of opinion, that the conversation of Mr. Swartwout affords no sufficient proof of such assembling."

We have been before told that the assemblage with the treasonable intent would *amount* to levying war, would

complete the crime of levying war; here in variant language, but language equally as strong if not stronger—we are told, that if the treasonable intent is carried into execution,—how? by deeds of violence and force? No: but by an open assemblage of men for that treasonable purpose,—this crime is *consummated*; not that by such assemblage the crime is in an incipient stage; not that it is advancing to maturity; but that it is *consummated*. To remove all possibility of doubt, the court then begin to consider the subject analytically. “The prisoner stated that” “Col. Burr, with the support of a powerful association, extending from New-York to New-Orleans, was levying an armed body of seven thousand men from the state of New-York, and the western states and territories, with a view to carry an expedition to the Mexican territories.”

“That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men without assembling them is not levying war. The question then is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually *to have assembled them*.” Here again it is clear that if the case has gone so far as that the men have been assembled, the crime in the opinion of the court is complete. Proceeding with the analysis the court say: “*It cannot be necessary that the whole army should assemble*, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage, and therefore this evidence should make the fact unequivocal.”

“The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an

equivocal act, and has no warlike appearance." *The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.*

"The particular words used by Mr. Swartwout are, that Col. Burr was levying an armed body of seven thousand men." If the term levying in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war.—If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

"It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout, there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason." After this language so clear and unequivocal, I should feel that I was insulting the understanding of the court, if I were to press the enquiry whether deeds of violence are necessary to constitute the treason of levying war against the United States. So far from deeds of violence, the court does not even require the assemblage of the whole force; but expressly declare that the mere *marching of individuals from a place of partial to a place of general rendezvous is such an assemblage* as would amount to levying war. Our court in this case has clearly maintained the line of demarcation acknowledged by the British courts between the *bellum levatum* and the *bellum percutsum*.

Does reason, sir, any more than law, require that you should wait until the blow be struck? If so, adieu to the law of treason and to the chance of punishment. The aspiring traitor has only to lay his plan, assemble his forces, and strike no blow till he is in such power as to defy resistance. Then what becomes of your constitution,

your law of congress, or your courts? He laughs them to scorn.

But where can be the necessity of waiting for actual violence? The overt act is only required as proof of the secret intention: now, although it is true, as Mr. Lee says, that hard knocks are things we can all feel, yet it is equally true, that an assemblage of men is an object we can all see; true it is, as the gentleman says, that small arms and cannons may be heard; so may the disclosure of a treasonable plot. At least the overt act which they require is but an appeal to the human senses; and the overt act which we have proven is equally satisfactory to them.

But Mr. Randolph wishes to know if enlisting be not enough, where you will draw the line short of force: the answer is obvious; *at the assemblage*; where the courts of England and the highest court of this country have concurred in drawing it.

Mr. Wickham, indeed, complains that if you stop short of actual force, you take away the *locus penitentiae*. I say, if you do not stop short of it, you take away the motive of repentance; for you offer the traitor victory and triumph, and it is not in their arms that we are to expect from him repentance. But was there, sir, no opportunity for repentance in this case? We shall prove that the prisoner was for more than a year brooding over this treason. The ruin and desolation which he was about to bring upon this country, must have been often before him. If all love of his country were so far extinguished in his breast that he would not forbear; if the downfall of liberty and the horrors of civil war gave no pang of remorse to his bosom, why for his own sake did he not repent? Why did he not remember the treason of Cæsar, and the dagger of Brutus? Why did he not remember Cromwell, as bold and daring as himself, and the miserable effects of his successful usurpation; the terrors that haunted and scourged

him day and night, and blasted him even amidst the splendor of a palace. Cæsar and Cromwell, he did remember; not to detest and to repent, but to envy, to admire and to emulate. Such is the kind of remorse which he felt at the idea of drenching his country in blood, and substituting despotism for liberty; such the very promising disposition and temper for repentance which alone he manifested.

Sir, it is clear that neither reason nor law require actual war, the *bellum percutsum*, in order to make a levying of war.

But Mr. Wickham tells us, that if *actual force* be not necessary, *potential force* at least is necessary; and by potential force he means intimidation. To illustrate his meaning still more distinctly, he puts this case: suppose a body of men assemble in the country in great numbers and move into this town for the purpose of attacking the capitol and seizing the public arms; the people of the town, intimidated by them, stand aloof and make no resistance; this, says he, is potential force.

To this requisition I have two answers:

First, that neither the law of England nor the supreme court of this country require any such thing. I need not repeat the authorities upon this subject. The passages which I have recently read from the decision of the supreme court are fresh upon your memory; and you know that they do not even squint at any such idea; but repeatedly declare the crime to be *completed* and *consummated* by the bare assemblage for a treasonable purpose.

My second answer to this requisition of potential force is this, that if it be necessary, and if I understand what is meant by it, it does exist in the case at bar. Let us examine what is meant by potential force. In the case put by the gentleman of a multitude marching to attack the capitol and the people of the town standing off in appre-

hension and alarm; what is the force which operates? not hard knocks, confessedly; but the excitement of fear and apprehension. Suppose, however, that the town people, instead of being frightened into submission, had been excited by apprehensions for their capitol and themselves, to take arms in their defence; the same affection of the mind would still be in operation, although in a different degree; it would still be apprehension for their safety, which would urge them to their defence; in this case the approaching body, although not successful, has had its effect; it has compelled the town to arm in opposition to it; would not this be completely the exertion of potential force; would not the town have been forced to its defence; and as the force which produced that effect was not *actual*, must it not have been *potential*? Suppose, in this case, the town, thus compelled to arm in its defence, should march out to meet the approaching body; should rout them, without a blow on either side, and should seize and destroy their baggage waggons: I ask whether this approaching body, formed of citizens, would not be traitors? My reason and judgment tell me that the force then acting on the inhabitants of the town, the alarm which made them fly to arms, *is potential force*, and that those who had exerted this species of force upon the town, would be traitors even according to Mr. Wickham's conception.

I ask then, whether the assemblage on Blannerhasset's island did not exert this species of potential force on the surrounding country? What was it that urged the state government of Ohio, to send a body of men to take this party and seize their boats? It was a well founded alarm and apprehension of the objects of this assemblage. What was it that caused the militia of Wood county to be put in motion and marched to the island? The same mental affection, the same potential force, the same alarm

and apprehension which had acted on the government of Ohio? What was it, when this assemblage fled from the island and advanced down the river, gathering, like a snow ball on the side of a mountain, magnitude and momentum as it rolled along? What was it that threw the city of New-Orleans into dismay and consternation, and produced the movement of the American army in that quarter for its defence?—Sir, this terror and alarm arose from the designs of the prisoner and his party: designs which we shall prove upon them, if permitted. And contemptible in point of numbers as the party under Aaron Burr may appear, it will be shown to you, sir, that the United States had not a garrison on the river, nor in New-Orleans in the *then* temper of that city, capable of resisting the designs of the prisoner. These are facts which will be in proof if the evidence shall go on: and farthermore, if the accused and his party may be believed, that he had men engaged, and prepared to join him at the motion of his finger, in sufficient force to have given battle, and in a better cause, successful battle, to the whole army in the south. This threatened power did not indeed rise and show itself; the unexpected vigor of the government, and the equally unexpected virtue and indignation of the country, awed them into silence and kept them down. Upon the whole, sir, if potential force be required, we shall prove it in this case: and I believe it is by this time too apparent that the assemblage on the island had every character and property which either law or reason require to constitute an overt act of levying war.

But let me suppose that you shall think otherwise; to whom does it belong to decide whether there has been an overt act or not? What did you yourself decide the other day upon this subject?

“ Levying of war, is a fact, which must be decided by the jury. The court may give general instructions on this,

as on every other question brought before them, but the jury must decide upon it as compounded of fact and law. Two assemblages of men not unlike in appearance, possibly may be, the one treasonable and the other innocent. If, therefore, the fact exhibited to the court and jury, should, in the opinion of the court, not amount to the act of levying war, the court could not stop the prosecution—but must permit the counsel for the United States to proceed to show the intention of the fact, in order to enable the jury to decide upon the fact, coupled with the intention.”

In strict unison with this opinion is the English law. 1 Hale, P. C. 1 East, 67. This court then having itself decided that the question whether there has been an overt act or not, belongs exclusively to the jury, it is strange that the prisoner should persist in pressing it on the court. What does he mean by it? Such an anxious perseverance in this course, certainly implies a reflection either on the jury or the court; it implies his belief, either that the jury will not do him justice; or that the court will do him more than justice; if he believed that the jury would do him justice, and wished nothing more, he would be content to leave his case to the jury: if he believed the jury would not do him justice, and he therefore tries to force his cause before the court, whether they will or no, I may truly say that he exhibits a phenomenon unprecedented upon this earth; a man flying from a jury of his peers to take refuge under the wings of the court. Sir, I can never think so ill of my countrymen as to believe that innocence need to fly from them. Nor will my respect for this court suffer me to apprehend for a moment that any consideration will induce them to invade the peculiar and acknowledged province of the jury. Sir, I believe that my respect for this court, personally and officially, is too well known, to apprehend that remarks

of a general nature will be applied to them. But if, at this period, when the intellectual power and illumination of the bench is so universally admitted, a precedent be set, by which the great facts in a trial for life and death shall be wrested from the jury and decided by the bench—what use may not be made of it hereafter:—In the fluctuations of party—in the bitterness and rancour of political animosity—some tyrant Brumley, or some ruffian Jeffries may mount the bench!—can the soul look forward, without horror, to the dark and bloody deeds of death which he might perpetrate, armed with such a precedent as you are now called on to set. But you will not set it, sir. You will not bring your country to see an hour so fearful and perilous as that which shall witness the ruin of the trial by jury. I shudder to reflect what might be the consequences of such an hour.

I have finished what I had to say, sir: I thank the court for its patient and polite attention. I am too much exhausted to recapitulate, and to such a court as this I am sure it is unnecessary.

SPEECH OF MR. HUGHES,

ON GEN. WILKINSON'S PROCEEDINGS AT NEW ORLEANS.

THE extraordinary measures adopted by Gen. Wilkinson, in New Orleans, for the avowed purpose of defeating the treasonable designs imputed to Colonel Burr, produced in that city, and generally throughout the territory of which it was the capital, a very strong sensation. The subject occupied for a long time the attention of the local legislature. Mr. Hughes, a member of the house of representatives, proposed that a joint memorial from both

branches of the legislature, should be sent to congress to inform them of these proceedings and to solicit redress. The memorial was as follows: we give it at length, as it will enable our readers more fully to understand and appreciate the speeches made in its support.

MEMORIAL:

To the Honourable the Senate and House of Representatives of the United States, in Congress assembled.

EXTRAORDINARY and alarming events, oblige the legislative council and house of representatives of the territory of Orleans, to appear in the character of complainants, at the bar of your honourable body.

Among the privileges secured to us by the treaty of cession, were some which congress thought of so much importance, that they hastened to bestow them as an earnest of the further benefits we were taught to expect. We knew how to appreciate them; and read with satisfaction in the first law passed for our government, the provision, that "the inhabitants of the said territory, shall be entitled to the benefits of the writ of *habeas corpus*. They shall be bailable, unless for capital offences, where the proof is evident or the presumption great, and no cruel or unusual punishment shall be inflicted."

Whenever we have been tempted to complain that other privileges, deemed by us *essential*, were withheld, we have been reminded of former periods in our history, when *liberty* was only a *tenancy* at the will of our superiors, and told to be grateful for the extension of a remedy against every species of illegal, personal violence; we examined the nature of this provision, and saw in its theory an admirable contrivance to secure the liberty of the citizen; we enquired into its operation, and found that its practice had produced the correspondent effect; and we considered

this assurance of personal, as the first step to political independence.

Secured from the dread of legal punishment by a determination not to merit it, and safe in the protecting power of the law against all attacks on our reputation or property, we assumed the plain but lofty port of *freedom*, and looked forward to the period when 60,000 citizens, who had by enjoying, learned to appreciate their rights, should unite in assuming an equal rank in the great *federal family*; a station to which "Nature and nature's God," has destined them. Under these anticipations, our government experienced another change. And here again we rejoiced to find the invaluable privileges of personal security, re-assured with other provisions equally important. In the second article of the ordinance, it is declared that "the inhabitants of said territory shall always be entitled to the benefits of the writ of *habeas corpus* and of a trial by jury—that all persons shall be bailable, unless for capital offences, when the proof is evident or the presumption great, and that no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land." We view with admiration, and as children of the great *American family*, claim a participation in the benefits of the constitutional provisions contained in the 7th and 8th articles of the amendments of the constitution, and fear not the disapprobation of congress, when we contend that within this territory "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger." And that in all criminal productions the accused "shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously as-

certained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.”

We feel a grateful pleasure in referring to these constitutional bulwarks erected for our protection—an honest pride in the consciousness that we have not rendered ourselves unworthy of the blessing—and an indignant grief which we are sure your honourable body will participate, in the reflection that the noblest plan ever devised for the protection of personal liberty—the finest theory ever imagined for the restraint of arbitrary power, should, before we had well seen its operation, be rendered abortive; that the best gift offered by the United States should be violently torn from our grasp, and that, while its constitutional guardians looked tamely on, the holy temple of justice should be sacrilegiously rifled of this revered palladium of our rights.

The annexed documents support the following statement of facts, to which we entreat the immediate and efficient attention of the proper branches of government.

The return of the regular forces to this city in ——— last, announced to us the settlement of our differences with Spain upon our frontiers, and we felt grateful to those who had been instrumental in tranquillizing the country. But our tranquillity was of short duration. Measures were soon put into operation which filled the city with alarm, and every thinking mind with the apprehension of the most sinister events. Very active preparations were made for defence, but the utmost mystery observed as to the cause; rumours were put into circulation of an intent to proclaim martial law; and the old forts which command the city were repaired. At length, when a sufficient degree of alarm had been created, the merchants of the city were invited to convene at the government house on the ———

day of December last, and many of them attended. They were met by the Governor of this Territory, and Brigadier General Wilkinson. The latter communicated to them that the preparations then making were to oppose Col. Burr, who had formed a plan to sever the western from the Atlantic states, and to invade the province of Mexico. That in the prosecution of these objects, he would himself be at Natchez, with two thousand men, by the 20th of December, and would soon after be joined by a body of six thousand men. That with this force he would march down to this city, take possession of it, plunder the banks, and seize the shipping to transport his army, under convoy of a British fleet, to La Vera Cruz.

This information, he said, he had received, partly by a letter from Mr. Burr addressed to him (the General) written in cypher, and dated the _____ last, and received by him, at Natchitoches, on the 16th of October last; which letter, or a decyphered copy, he produced; *and which, among other things, acknowledged the receipt of one from the general of the 6th of the preceding month, and asked his advice as to the propriety of taking Baton Rouge on his way down.* Other parts of the plan, not contained in the letter, he stated had been communicated by a messenger from Mr. Burr, who had been sent to him at Natchitoches.

The governor supported the general in a speech, in which he stated his belief in the existence of the danger, and read a letter, which he said was anonymous, but the hand writing of which he knew to be that of a respectable gentleman in Tennessee. The parts of this letter which were read, advised him to beware of traitors—to beware of the month of December—to beware of the Ides of March—to *beware of the general*; and gave hints of some design against the city; it has since been discovered that this letter was actually signed *A. Jackson*, and advised the

governor to beware of Wilkinson. Both the general and the governor united in recommending an embargo on the shipping, as a measure essential to the general safety; the merchants who were present acquiesced in the necessity, and the embargo was laid. A ship of war was immediately stationed below the city to prevent the departure of any vessel without the general's passport, and some which had sailed without this document, were brought back and detained until it was procured, although the necessary clearances from the custom-house had been given; and we believe that although the collector has not since the ———— refused the papers required by law, no vessel is suffered to pass the fort at Plaquemine, without the general's permission.

Upon the illegality of this embargo, we need not offer a single argument. The legislative power of congress alone could legally enforce a measure of this nature. Upon its expediency, many considerations occur. Gen. Wilkinson was the only witness of Mr. Burr's treasonable designs; he stated his plan to embrace the attack of this place, the plunder of its wealth and seizure of its shipping; and in order to counteract these projects, it was determined to keep all the shipping in the harbour, to deprive them, by enlisting their seamen, of all hopes of escape, to detain the treasures of the banks, and by withdrawing all the outposts, and collecting the military force at New Orleans, to leave all the territory open to the invasion of the enemy.

We do not pretend to be judges of military operations, but on a point so essential to our safety as the defence of our territory, and so important to the union as the maintenance of its tranquillity, we can but advert to the impropriety of keeping the regular forces insulated in this city, and withdrawing the garrisons from fort Adams and Natchitoches, when the obvious policy, if invasion were apprehended, would have been to have met it in the de-

files of the upper country, aided by a numerous militia, instead of waiting an attack in a town incapable of defence; or if the attack of the Spanish dominions were meditated, to have occupied the garrisons situated on their frontier.

The embargo was a serious evil to our country; its immediate operation is already severely felt in the injury of private credit. The extent of its consequences cannot be easily calculated. In a government subject to events like this, commercial operations must be always uncertain, confidence must be destroyed, and the price of insurance, and uncertainty of returns, will always damp the spirit of enterprise, enhance the price of imports, and lessen that of staple commodities. These evils are already felt. The capitals about to be invested in our lands, in our public institutions, and in loans to our inhabitants, are suddenly withdrawn, and the spirit of emigration to our territory is destroyed; *and a fall of at least twenty-five per cent. in the price of real estates, attests the misfortune of our country.* Measures more deeply to be deprecated, because they struck at the root of all a freeman ought to value in life—measures fortunately unknown in the history of the American people, and which, we devoutly pray, may be only cited hereafter to show the exemplary punishment that followed their adoption.

On Sunday the 13th of December, Doctor Erick Bollman, a resident and house-holder of this city, was arrested by two military officers, under the command of brigadier general Wilkinson; his papers were seized—he was denied the privilege of consulting counsel—and was immediately hurried out of the territory. Two other persons, (citizens of the United States,) were arrested by a similar order and confined on board a bomb-ketch, opposite the city. For some days neither the arrest of these last persons, nor the place of their imprisonment, were sufficiently known to justify any judicial steps for their re-

lease. At length one of them, (Mr. Ogden) remarkable for his height, was discovered from the shore—a proper affidavit was made, and a *habeas corpus* obtained [from judge Workman,] in obedience to which, and contrary to the express order of general Wilkinson, the officer of the navy in whose custody he was, brought him before the judge, and he was released. The other, Mr. Swartwout, was immediately removed to more close confinement, and measures were taken, by frequently changing the officer of his guard, to avoid any proper return to the writ issued for his release.

An affidavit of the arrest of Bollman was presented to one of the judges of the superior court, on the afternoon of the 14th of December, together with the writ of *habeas corpus*, for his allowance; and it was urged by the gentleman who presented it, that the case was an urgent one—that the prisoner would probably be removed out of the reach of process by the next day. The allowance of the writ was at that time refused by the honourable William Sprigg, senior judge of the superior court, in order, as he alleged, that he might consult his colleague, and he not being at home, the motion for the *habeas corpus* was directed to be made in open court. On the following day, this motion appears to have been made by Mr. Alexander, supported by Mr. Livingston, both counsellors of the superior court; the writ was allowed. On Thursday the 18th of December, general Wilkinson, to whom the writ was directed, made his return, in which he set forth:—

The undersigned, commanding the army of the United States, takes on himself all responsibility for the arrest of Erick Bollman, on a charge of misprision of treason against the government and laws of the United States, and has adopted measures for his safe delivery to the

executive of the United States. It was after several consultations with the governor and two of the judges of this territory, that the undersigned has hazarded this step for the national safety, menaced to its base by a lawless band of traitors, associated under Aaron Burr, whose accomplices are extended from New York to this city. No man holds in higher reverence the civil institutions of his country than the undersigned, and it is to maintain and perpetuate the holy attributes of the constitution against the uplifted hand of violence, that he has interposed the force of arms in a moment of extreme peril, to seize upon Bollman, *as he will upon all others, without regard to standing or station*, against whom satisfactory proof may arise of a participation in the lawless combination.

(Signed)

JAMES WILKINSON.

After thus avowing his breach of the constitution and laws of his country, and declaring to the judges, sitting in their official capacity, that he would persevere in the same lawless course, he proceeded to denounce the two counsellors who had dared to question his proceedings; He demanded their immediate arrest—but though repeatedly urged, by the one who was present, to substantiate his charge, and though every effort since that period has been made by the gentleman accused to provoke enquiry into his conduct, we do not find that any proof whatever has been produced to criminate him; and we are therefore constrained to believe that this denunciation was intended to overawe those who might be inclined to extend their professional aid to the general's victims.

This deduction derives additional force from the proceedings afterwards pursued with respect to Mr. Alexander. On the following day he was, by virtue of a military order signed by general Wilkinson, arrested in his

house, and conveyed through the streets at noon-day under a strong escort of dragoons; he was paraded through the principal streets in the city, exposed to the pitying gaze of hundreds of the astonished inhabitants, and committed to close confinement at head quarters. From thence, with Mr. Ogden, who was a second time arrested, he was conveyed to some place then unknown. There is, however, unquestionable proof that on the 22d of January they were in confinement at Plaquemine.

The habeas corpus in the case of Bollman is the only one which was issued from the superior court in these cases of military arrest; the effect of that was rendered abortive by the alleged removal of the prisoner.

The other cases were prosecuted in the county court, where James Workman, esquire, presided. The history of those cases and the reasons why they were rendered ineffectual are contained in a report made by that officer to this house. That document demands the serious attention of the national legislature; and the tacit refusal of the governor of this territory, to give effective energy to the civil authority, will no doubt be examined by the executive of the union.

The picture however of our sufferings, degradations and injuries, is not yet complete. We have seen the citizen imprisoned, and his advocates dragged from the bar, denounced, imprisoned and banished; the violation of the sacred seat of justice itself was still wanting to give a finish and colouring, a glow of intense guilt to the group. This it received, for Mr. Workman, a few days after his communication was made to this house, was himself arrested, dragged to the guard house and imprisoned with Mr. Kerr (another gentleman of the bar, who had taken out the habeas corpus for Ogden,) until they were released by the prompt interposition of the district judge of the United States. We do not mean to

be understood as vouching for the innocence or guilt of the several persons whom the commander in chief of the American army has arrested. It is, however, somewhat unfortunate that the guilt of none of the victims he has chosen from the bar or the bench was ever discovered until they had distinguished themselves by doing their duty in opposition to his tyrannical designs.

In order to prevent all escape from scenes so full of horror, so degrading to an American, so ruinous in their consequences, and so disgraceful to those whose duty it was to protect us against them, guards were placed above, and forts and garrisons below the town—all travellers were stopped, searched, imprisoned unless provided with passports; and the citizens of this territory in passing quietly through their neighbourhood were not only stopped, but fired upon, by order of general Wilkinson. Innocent travellers from a remote part of the country have been forced to return one hundred miles to procure this license to travel in their own country.

This order has been enforced even against a member of this house, whose person was imprisoned until he had suffered an illegal examination of his private papers.

Though nothing can justify, yet circumstances of extreme danger in the moment of invasion during the suspension of the civil authority, might excuse some of these violent measures.—But here no foreign enemy or open domestic foe was then, or has yet been proved to have been within any perilous distance of this city, or that treason lurked within our walls.—Nay, there yet exists, within our knowledge, no proofs of any treasonable designs sufficiently organized and matured to give us any reasonable cause to fear for our safety. The courts were open to punish, juries to try, and officers ready to enforce the civil authority in all cases of conviction. If reasonable doubts could be entertained of any want of

energy in the civil authority, the military was at hand to aid its operations—but this ancillary process did not suit the views of the commander; his ardent zeal could not brook “the law’s delay,” his promptitude to support “the holy attributes of the constitution” would admit of no stay to his uplifted arm; and though by an union of mockery with violence, in many of the cases he began by an application to the courts and to juries, yet his impatience always snatched his victims before they had time to deliberate on the accusations he pretended to make.

Again we repeat to your honourable body, that we do not forget our department so far as to pronounce on the alleged guilt or presumable innocence of the victims of his violence. But we must be permitted to remark that in either case the proceedings are illegal, oppressive, and inhuman.

Thus we have briefly stated, with as few reflections as the nature of the case would admit, the acts of high handed military power to which we have been and are yet are exposed—acts too notorious to be denied, too illegal to be justified, too wanton to be excused—We have alluded to, but cannot fully describe the humiliating situation to which they have reduced us. Never would we have submitted to it, if the aid had been afforded by those branches of government whose duty it was to have protected our rights, to have resisted oppression, and to have rallied us around them on the first assumption of illegal power—at the head of these branches are men not appointed by us—over whom we have no control, and who are amenable only to congress for their conduct. We pray that that conduct may be strictly examined into, and that nothing connected with this extraordinary state of things may be concealed—We annex to this memorial a message from our governor, by which we are invited to a temporary

suspension of the writ of habeas corpus—a compliance with which we conceive would involve the violation of our oaths, the ordinance and constitution of our country, and without the semblance of necessity lend our authority to cover the unconstitutional proceedings of which we complain.

Our great distance from the seat of government renders oppression more bold by the hope of impunity—our scattered population takes away all fear of resistance—the ease with which men in office can procure testimony, or influence opinion in their favour, makes conviction more difficult—and the necessity of keeping up a large military force, will long expose us to a repetition of the evil—but all these considerations will, we are convinced, have the effect of rendering the proper branches of our government more watchful over the conduct of their officers, and we rely with confidence on the energy of the executive to remove, on the vigilance of the representatives to accuse, and the justice of the senate to punish the officers who shall be found to have disregarded their duty.

The memorial being read, a motion was made that it be recommitted.—Upon this motion the following animated and eloquent speech was delivered by Mr. Hughes.

MR. CHAIRMAN,

I AM astonished, that the gentleman from Acadia, or indeed any other in this house, could have the boldness to rise and support a motion for the recommitment of the memorial now under the consideration of this house; when I reflect, sir, that the same memorial has been handed about from one committee to another, one of which committees the gentleman himself was a member for at least forty days. That committee was discharged, and another appointed in its stead, and now upwards

of twenty days have elapsed, the memorial is brought forward for consideration, and the gentleman has the good conscience to propose the postponement of its consideration. I am in hopes the proposition will have no effect, and meet the opposition it justly merits. And now I am up, if I am in order, I will make some general remarks on the extraordinary occurrences which produced the memorial. They will be such I believe as no person in this house will find easy to refute.

Instead of hearing the memorial submitted by your committee, termed a libel, I expected to have heard it applauded for the temperance and mildness of its language; instead of hearing it asserted that it contained charges unfounded and malicious, I was myself prepared to accuse the committee of having overlooked many important causes of complaint, and I was even tempted to offer proofs of some, to be added by way of amendment to the report. I confess, Mr. Chairman, that I look around me with astonishment—that I doubt the evidence of my senses, when I hear conduct, such as that of which we complain, palliated or excused; and I would rather bear the idea that a temporary insanity had assailed me, than be forced to the mortifying certainty, that these palliations, these excuses, the mean, humbling, half justifications, of arbitrary power, have been asserted by Americans, in a free deliberative assembly;—*Free assembly!* pardon me, Mr. Chairman, the unguarded expression; it is the bitterest irony in our situation. Are you safe, sir, in your chair? Are either of us in our seats free from the fear of actual violence? The sword of power is waved over our heads—the bayonets of military despotism are at your door, and the adoption of that memorial may be the signal for your immediate seizure, banishment or death! And pray, sir, to what quarter will you look for protection? To the executive of the territory? It is worse

than palsied—it is actually enlisted in the service of your oppressor! To your constituents? Your tame submission to these outrages—your wretched time-serving delays—the want of character and energy we have for two long months displayed,—have destroyed all confidence in us, or sympathy for our sufferings. But there is no danger; the storm has blown over; the clouds are dispersed, and we are now to enjoy the full sunshine of liberty and peace.

But what security have we that the momentary calm will last? It is true that for two or three weeks past, we have not seen any of our constituents dragged from their families or friends; that the guard which insulted even members of this house, and violated its privileges, is withdrawn; that a citizen may now ride a few miles out of the city without having his pockets searched, and the secrets of his friends and family exposed to the insulting scrutiny of a subaltern; that defenceless women and children are no longer made prisoners of state; and that the business of the court is no longer confined to the nugatory writs of *habeas corpus*, or the reception of insulting returns.

But, sir, these scenes were attended with a thousand aggravating circumstances, which have but just passed before our eyes;—and what security have you, I repeat, that they will not be renewed? The same force that was employed, the same tyranny that directed it, are yet in your city. An eye is kept over all your proceedings: every word uttered here is, I most religiously believe, carried to your oppressor; and upon his will alone depends our future fate. We know this; we feel it, and yet we do not blush to say we are *free*! No, sir, we are not free; and our constituents will, I hope, ascribe to fear, and nothing but fear, the event which I anticipate with mortification and horror, when a majority of the members of this house shall reject that memorial; and when that same majority

shall adopt in its stead, an address, excusing, palliating, or even justifying the conduct that has wantonly destroyed your constitution, and impudently violated your laws; when we shall crawl in the dust beneath the feet of our oppressor, and show the weakness, but surpass the forbearance of the poor reptile that turns when trodden on.

Sir, will it, can it be said, that real or apparent danger rendered this conduct necessary? If I am answered in the affirmative, I say the assertion is a *libel* on our constituents; I will never sanction it by my voice. What sir! was the political body so contaminated here, that justice could not be administered? Where were the traitors? Have they fled from justice? Have they made their escape from this city? Why are they not now dragged to justice? Why are their names concealed from an indignant public? Because neither treason nor traitors existed in the country thus calumniated! Because the idea originated only in the mind of a man, who wanted by the excess of a new-born zeal, to cover the suspicions of guilt; and who hoped to stop the investigation of his own conduct, by magnifying the danger from which he wished to have us believe his services had delivered us!

The letters, the papers, and the persons, nay even the private conversations of the inhabitants of this territory, have for three months been under the absolute control of the public officers. If treason had existed in this territory, it would in vain have endeavoured to escape detection—If the people were so disaffected, that they were ready to snatch the culprit from the hands of justice—if the judges could not be trusted to commit, nor juries to pronounce on the guilt of the delinquents, surely with such means, and so inquisitorially exercised, some evidence of the fact would have been produced; some document, some declaration, some bottle conversation;—some confidential communication would have been

drawn forth from the secrecy in which friendship and honour had buried them, to bear testimony of guilt, or at least to justify suspicion.

I therefore repeat, and so long as my feeble voice can be heard, I will continue to proclaim, that our constituents have been vilely calumniated, as well as cruelly oppressed; that insult has been added to injury; and that their imaginary disaffection has been slanderously alleged as an excuse for their real oppression. Away then, sir, with the degrading excuse derived from domestic treason or disaffection. It is one that will surely find no favour with the executive of the United States, who has borne honourable testimony to the readiness with which the force of the territory was, in a moment of danger, offered to support the union; nor will it be believed here, when we have seen our most respectable citizens performing the drudgery of garrison duty, and condescending, even on the mere allegation of the general, to undertake the task of executing orders odious in themselves, and which I am sure must have been doubly disagreeable to them, both as free citizens, and men of respectability in society.

If there was no danger from domestic insurrection, did any pressing peril from without, threaten us with such immediate destruction, that no time was given to deliberate, or consult the constitutional organs of accusation? From whence did it arise? We have been told but of one quarter from whence any was expected! yet it is extremely difficult to reconcile the existence of any such danger, with the measures pursued to avoid it. If the commander in chief of the American forces was really in earnest, when he told us Burr was expected at Natchez on the 20th December, with 2000 men, would he have dismantled Fort Adams? would he have endeavoured to weaken the Mississippi territory, by demanding 500 men from thence, to be brought to this place? would he have

thrown his whole force into a defenceless town, and left the whole upper country open to invasion? and would he, I ask it seriously, and pray his advocates in this house to give a satisfactory answer—would he have concealed his knowledge of the danger from the governor of the country which was to be the first invaded? of that in which the force was to have been collected? Would he not instantly have requested governor Meade to put himself on his defence? would he not, instead of endeavouring to weaken that territory, by a requisition of militia, have marched there with his regular force, and thus checked the first effort of rebellion? or would he not have nipped it in its bud, by sending a copy of his cypher letter to the governor of Kentucky, before any force could possibly have been embodied? Or while the juries of the upper states and territories were groping in the dark, and for want of proof pronouncing the mighty culprit innocent—would he not have furnished that evidence which he had in his possession, and which would have exposed the traitor himself and his schemes to detestation and ruin?

If the object of Mr. Burr was to plunder this place of its wealth, and to seize on its shipping, would he, I ask, have laid an embargo to keep both within his reach? If he had not had some other scheme than mere defence against this northern rebellion, would he have expended the treasure of the public, in erecting fortifications in the centre of your city, useless against a foreign foe—efficient only to overawe your citizens, and to ruin their properties in its suburbs? Would, in fine, the naval force have been stationed along the river in small detachments? or would they not have been collected so as to act with some advantage against the descending force?—It is notorious that at the moment when he announced the greatest danger, of the four gun boats in the river, only two were stationed as high up as Point Coupée, and the two

others at long intervals on the river, so that they might successively have been taken, if half the supposed force had descended with the hostile army; and is it possible to suppose, that if the object had been to interrupt the invasion of Mexico, that no part of the naval force should have been stationed above Red river, and that Nachitoches would have been left almost without a garrison?—It is plain, therefore, from these acts, from these omissions, from these arrangements, that no serious danger was apprehended—but that for purposes best known to the general himself, and his coadjutors, it was deemed necessary to keep up the alarm; to divide and weaken the country; to curb the town; to keep all its wealth in his power; to scatter the naval, and render the military force useless; to magnify the force of the enemy, and to terrify the executive, the legislature, and the judiciary into a dereliction of their rights. With the first, unfortunately, he has succeeded; the last remain yet at their posts, and this day is to determine whether we are to partake the disgrace of the one, or share in the credit due to the other! for let us not deceive ourselves as to the effect which our approbation of these measures, or even our silence, will produce. A sacred trust has been committed to our keeping; personal honour, national dignity, and the solemn sanction of an oath, concur in pointing out our duty. Should we betray this trust; should we disregard what we owe to ourselves, our country, and our God; should we be bold enough to bear the reproaches of that internal monitor, which no sophistry can refute, no pretended necessity silence, no power overawe; should we have the hardihood to do this, I ask, can the boldest of us meet his constituents with composure, before they appear at their tribunal? The effects of this vain terror, if it ever possessed their minds, will be dissipated. When we render an account of this winter's transactions, will

they, I say, be satisfied with our list of divorces? with our militia arrangements? or even with our grand reforms in the judiciary, if they should be effected? No, sir, they will inquire of us about events which more nearly concern them; they will inquire of their violated rights; they will ask about their constitution, committed to our care; and in a stern accent, in which the *voice of the people must appear to us the voice of God*, they will demand whether we did not, in his awful presence, swear that we would preserve that constitution inviolable for ever?— They will then point to the open, avowed, undisguised infractions it has received in our presence; before our eyes; in our own persons; in the very sanctuary of our legislature; and ask us what measure we took to preserve the constitution? what steps to avenge the injuries it received?—What answers shall we, can we give to those inquiries? Shall we reply, “It is true we have sworn to preserve your constitution and rights; it is true we have seen them openly violated and despised; we saw the commerce of your country endangered; its citizens dragged disgracefully through the streets, first to a military dungeon, then to banishment and ruin; it is equally true we saw the peaceful traveller stopped on the highway, searched like a felon, and forced by violence to ask protection in passports, unknown and unauthorised by our laws; that private papers have been seized, private letters examined; that women and children have suffered imprisonment, exposed to cold and hunger; that our own privileges have been infringed; that our own dignity has been destroyed; that our country has been *slandered*; that your known loyalty has been questioned; and that your representatives have been insulted by a solemn proposition to violate their oaths, and join in the unholy work of destruction!” All this, we must proceed to say, we beheld with tame submission, all this; some of it

countenanced and admitted; and when solemnly called by the indignant voice of our country, to express in our legislative capacity, the feelings which ought to glow in the breasts of freemen, we excused these illegal acts; we palliated these enormities; we threw the mantle of legislation upon the nakedness, the folly, the vice of executive acts. Though we could not lessen the horror so considerably felt, we meanly undertook to divide the odium:—we humbled ourselves in the presence of a petty officer, and terrified by the bayonets of a single regiment, we kissed the rod, and justified the reproach of your enemies, by our mean submission and flattery, that “*you are not fit to be free!*”

Shall we be obliged to make this humiliating confession? No, sir, it is yet in our power to retrieve the credit we have lost—to assume the character that befits us—to address the legislature of our country in the language of manly freedom—to show to the executive how much he has been deceived and betrayed, by the civil and military chiefs; and to give him an opportunity of dismissing the weakness that degrades, and the tyranny that ruins his service in this territory. And yet, sir, it is principally for our own credit, that we ought to seize this occasion of showing that we are not the unworthy representatives of a patriotic people. For, whatever ideas we may have of our duty, the representatives of the United States will know their's; though we may be silent, they will speak; they are fearless, though we may tremble; and should we flatter, they will never cringe;—and next to the consolation of having done my own duty, I find one in the certainty that there are at least *one hundred and thirteen* independent men in our councils, who have remembered their oaths, and will punish the betrayers of their country.

DR. WATKINS'S SPEECH

ON THE SAME SUBJECT.

SIR,

I OPPOSE the gentleman's motion for recommitment. I consider it a subterfuge to get rid of the memorial altogether; and I am warranted in saying, from the conduct of that gentleman and his friends, that if you consent to his wish, the memorial will never more make its appearance in this house.—The gentleman says it contains errors. If so, and he or any other member will give himself the trouble to point them out, they can be corrected in a committee of the whole house, as well and as expeditiously as in any other way. I am disposed to believe that there may be some few errors, but they are of a trifling nature, and not calculated to affect the body of the memorial in any material or important point. I have too great a respect for the constituted authorities of my country, too much regard for the character of this house, and too high a reverence for the dignity of that tribunal to whose justice we are about to appeal, ever to consent that your memorial shall be disgraced by one doubtful fact, or one disrespectful expression; and I have too much regard for my own reputation, to suffer myself to be guided by any other principle than that of truth; by any other motives than those whose object is the public welfare. If, sir, the gentleman's motion should fail, I shall propose such alterations as in my opinion ought to be made in the memorial, when it comes to be discussed by paragraphs. But when I take a view of the conduct of this house; when I advert to the extraordinary and unprecedented proceedings which took place this morning of attempting to thrust the memorial out of doors, with-

out even suffering it to be read, I am compelled to believe it is the object of that gentleman and his friends, not only to reject it, but to avoid, if possible, any discussion on the subject. Under these circumstances I shall avail myself of the present opportunity to make some observations on the memorial itself.

It will be recollected, sir, that I suggested the propriety of such a measure at the beginning of your session. I thought it proper to transmit to the general government a faithful narrative of the principal events in the political history of our country a few weeks previous to that time. The same opinion seemed then unanimously to prevail in this house; and a committee was accordingly appointed to draw up a memorial to congress. I was solicitous for the memorial to go on at that time for several reasons. In the first place it would have found congress in session, and as all communication between the individuals of this country and the Atlantic states, had been intercepted by your rulers, who seemed desirous of usurping the empire of thought as well as that of law, I deemed it expedient that the representatives of the people should endeavour to defend the honour and interests of their country, by presenting to the general government a faithful picture of their situation. It cannot be denied but at that time it was dangerous for a private citizen to express any sentiment in opposition to the measures of the day. It will not be denied but that even upon this floor, (except when your doors were closed) no member had courage enough to condemn the conduct of general Wilkinson. However conscious he might be of his own innocence; however high his bosom might glow with patriotism, and however great his indignation at the wanton violation of the laws and constitution of his country,—not one of you dared, in those dangerous times, publicly to avow your real opinions. The bold and independent conduct of the re-

representatives of a free people, would probably have been rewarded by a military arrest—a violent separation from his family and friends, and an ignominious transportation to—God knows where—to a Spanish dungeon, or at least to a distant part of the United States, to the utter ruin of his fortune, and the eternal injury of his honour and reputation. Again, sir—if at that period of your session, I could have succeeded in sending forward a proper memorial, I would, after having voted the necessary supplies for the support of the government, and providing by all the means in our power for the protection and safety of the country, have proposed to this house to adjourn, because it was insulting to exhibit to a people just admitted to the enjoyment of the boasted principles of *republicanism*, the deplorable spectacle of a military chief in the very presence of their legislature, violating not only the laws and constitution of their own territory, but trampling under foot that sacred charter of freedom, which had been erected at the expense of the blood and treasure of so many of our ancestors.

What was the language of every native Louisianian on that occasion? “Formerly,” said they, “such conduct would not have surprised us; we were then at the mercy of arbitrary power. But we had been told that our situation was changed; that we were governed by laws, and not by the caprice of men; that the rights of the private citizen were as sacred as those of the highest in authority; that the humblest cultivator of your soil and the chief magistrate of your country, were bound by the same laws, and subject for their violation to the same penalties. What has become of this boasted liberty, this government of laws?—It has fled, like a vision, before the accursed influence of military despotism. While you on the one hand are making laws at an enormous expense to your country; the commander in chief is violating them on the other, setting your authority at defiance,

trampling upon the sovereignty of the people, and prostrating every principle of liberty, which you had taught us to revere."—For reasons best known to your committee, they never made a report. And here I cannot forbear remarking that they did not discharge the duty which they owed to their country, or to the dignity of this house.—After having amused you for upwards of forty days, you were obliged to discharge them and name another committee in their place, who have reported the memorial now under consideration. I am a friend to this memorial with the alterations I have suggested, because in territorial governments, where the principal officers are appointed by the president of the^e United States, to whom and to the senate alone they are responsible for their conduct, it becomes the duty of the representatives of the people, whenever their rights are infringed, to lay their complaints before congress, the legal guardians of the liberties of the people.—For wise purposes it has been thought proper to establish this kind of government in remote parts of the union, where the number of inhabitants did not justify the formation of an independent state. It is a kind of probationary state, (many of you, gentlemen, may think it a purgatory) through which it is deemed necessary that we should pass, before we are admitted to the full enjoyment of that glorious inheritance which is the birthright of every native born American. For myself, I am no great admirer of this form of government: my objections to it are various: it may, however, be the best which could have been devised for us. In a country like our's, just emerging from despotism, composed of the inhabitants of various nations and languages, unacquainted with political concerns, because they had not before been allowed to take any share in the administration of government; it was perhaps good policy to regulate their admission as an independent mem-

ber of the great American union, by gradual and progressive steps. But it never for this purpose was intended that we should be oppressed. Congress did not set over us men who were to rule us according to their own arbitrary will. On the contrary, they extended to us by express, written, and clearly defined laws, the chief of those fundamental principles of liberty, recognised and secured by the federal constitution.

I am not one of those who are disposed on slight grounds to censure the conduct of public men. I am well aware of the folly of attempting, nay of the impossibility of satisfying every body. I hope however I have discernment enough to see, and courage enough to expose any wanton inroads upon our rights, under whatever name, or by whatever specious pretexts they may be sanctioned. We are removed at a great distance from the seat of the general government. Until very lately we have had no delegate upon the floor of congress; and as it relates to the subjects of which we are now speaking, he must be totally ignorant. We have been formerly calumniated, and we were silent. We have been recently denounced, insulted, and accused of treason—it is therefore high time to vindicate ourselves.

One word, Mr. Chairman, as relates to the general state and situation of our country. We have a population of nearly 60,000 souls, scattered over a territory of six hundred miles in length, and nearly the same breadth. Of this population, about one half are slaves, one tenth free persons of colour, and the remainder free white persons. The whole of our militia, thinly distributed over this extreme region, if you except the battalion of coloured people, do not amount to more than six thousand men. During the existence of the Spanish government here, in addition to this militia, it was thought necessary for the safety of the country, to keep up a considerable mili-

tary force, and accordingly the king of Spain maintained a standing army in the different parts of the then province to the amount of from two to three thousand men; and that too at a time when he was sole proprietor of the whole country, and free from the menaces of any enemy. Since the taking possession of this country by the United States, we have frequently been under serious apprehensions of an attack on the part of the Spaniards. They have more than once invaded our territory: they have constantly kept up an armed force on our frontiers; and they are masters of the country not only on the east and west *of our settlements*, but are in possession of Baton Rouge, a fort which could be easily made to command the navigation of the Mississippi from above, and enable them at any time to lay waste the lower country, and seize upon this city. Notwithstanding this exposed, defenceless situation; notwithstanding the importance of this country to the American union; we never have had at any time, (if my information be correct,) for two or three years past, more than from one hundred and fifty to three hundred troops fit for actual service in this city or its vicinity. But where, it will be asked, are your 6000 militia? It has already been seen over what an extensive country they are spread, exposed in all directions to a jealous and restless neighbour. But this is not all. When the number of our slaves is taken into view, any man in his senses will see that instead of marching our militia from their homes to fight foreign battles, it will be always necessary in times of war, to strengthen them on their own plantations, for the purpose of protecting their families, and enabling them to keep up a proper subordination among their slaves. Our militia are moreover peculiarly situated. They have never been as yet, owing to various circumstances, properly organized; and this country has changed masters so often in the course of a

few years, and its political relations so frequently varied, that it would be unnatural to expect from its inhabitants in the course of a few months, during which time they have experienced many vexations and disappointments, any very ardent affection, either to our nation or our government. I do not insinuate by these observations that the people of Louisiana are not brave, and possessed of all the qualifications which adorn the character of man, and render him a good citizen: I believe them attached to the principles of our government, and willing to sacrifice their lives and their fortunes in defence of their country: nor have I taken this view of our situation for the purpose of censuring our local or general government. *I will not pretend to say where the blame lies.* I know not whether our real situation has ever been known, or whether if known, it would have been better provided for. All I contend for is, that we have been left in a defenceless, unprotected state;—and that at the arrival of Gen. Wilkinson upon the Sabine, we were at the mercy of the Spaniards or of any enemy that might have chosen to make war upon us. Judge then, sir, of the gratitude and affection with which that general was received, when after having settled the difficulties in the west, which had occasioned great uneasiness and alarm, he came with his army to take up winter quarters in this city. He was hailed with joy by every lover of his country. We had heard with some anxiety, it is true, of his having demanded of the acting governor of the Mississippi territory, five hundred militia, and of his having given orders for the dismantling Fort Adams and for the transporting to this city all the artillery and military stores of that post. But we flattered ourselves that it was for the better defence of the country, and the protection of its inhabitants. Shortly after his arrival, every thing was put in motion, and great preparations were made for repairing the old

fortifications. In addition to the soldiers, a number of negroes were hired at enormous expense—large contracts for lumber and pickets were made—and we were informed that the whole city was to be immediately put in a state of defence—Military guards were posted in various parts of the town—one of our principal streets, which had cost the corporation many hundred dollars, was blocked up, and public curiosity was excited to an alarming pitch—the most profound mystery was observed on the part of the general and the governor, as to the cause of these warlike preparations—conjecture was on tiptoe; and as it is impossible to stifle inquiry in the busy minds of freemen, every one made war with the nation he liked the least, and by turns the batteries of St. Charles and St. Louis were made to play against Spain, France, England, and even against our own country. The most rational part of the community were lost in astonishment. “If we are preparing, (said they) to fight a foreign foe, why desert our frontiers, entrench ourselves in New Orleans, place our safety in her imperfect walls; and leave the Balize, Fort St. John’s, Fort Adams, and the Walnut Hills, unprotected by a single cannon or a single man.”

While the public mind was in this state of agitation and alarm, an assembly of the merchants was called at the government house. To these gentlemen the general stated that *Aaron Burr*, in combination with a number of wealthy and influential characters, from various parts of the United States, were engaged in a desperate and lawless enterprise to invade Mexico, to sever the Atlantic from the Western states, to make himself master of this city, plunder the banks, seize upon the shipping, and under convoy of a British fleet, to transport his army to La Vera Cruz. In the prosecution of these objects, Burr himself was to be at Natchez by the 15th or 20th of December, with 2,000 men, and was soon

afterwards to be joined by a body of six thousand more. This information the general said he had received partly by a letter in cypher, addressed to him from Mr. Burr, and partly by a letter from Mr. Dayton, also in cypher, received on the 10th of October last, while at Natchitoches. The other parts of the plan had been communicated to him by accredited agents of Burr, sent for that express purpose.

The governor confirmed the account which had been given by the general, and read some parts of a letter, which he had received from a gentleman of high respectability in Tennessee, advising him to beware of traitors—to beware of the 20th of December—to beware of the ides of March—and both him and the general united in recommending an embargo to be laid on the shipping, which was accordingly done.

It is, Mr. Chairman, difficult to conceive, but much more so to describe the consternation which this disclosure produced upon the public mind; but great as it was, it was equalled if not surpassed by the honest indignation which burst forth against the authors of this infernal plot, from the bosom of every citizen of our country. It is impossible to determine what description of men were most ardent to meet the traitorous foe—and I solemnly declare my belief that there is not a respectable citizen of the territory who would not have risked his life in defence of his country. One or two new volunteer companies were formed, the old ones were augmented, and the battalion of *Orleans Volunteers* gallantly offered their services to the executive for the defence of their country. The officers of the militia were extremely active; great exertions were made to complete their organization, and every demonstration of zeal in the common cause given on their part. There seemed to be but one object and but one mind—resistance, and death to the traitors. While we were engaged in reflecting upon these

fortifications. In addition to the soldiers, a number of negroes were hired at enormous expense—large contracts for lumber and pickets were made—and we were informed that the whole city was to be immediately put in a state of defence—Military guards were posted in various parts of the town—one of our principal streets, which had cost the corporation many hundred dollars, was blocked up, and public curiosity was excited to an alarming pitch—the most profound mystery was observed on the part of the general and the governor, as to the cause of these warlike preparations—conjecture was on tiptoe; and as it is impossible to stifle inquiry in the busy minds of freemen, every one made war with the nation he liked the least, and by turns the batteries of St. Charles and St. Louis were made to play against Spain, France, England, and even against our own country. The most rational part of the community were lost in astonishment. “If we are preparing, (said they) to fight a foreign foe, why desert our frontiers, entrench ourselves in New Orleans, place our safety in her imperfect walls; and leave the Balize, Fort St. John’s, Fort Adams, and the Walnut Hills, unprotected by a single cannon or a single man.”

While the public mind was in this state of agitation and alarm, an assembly of the merchants was called at the government house. To these gentlemen the general stated that *Aaron Burr*, in combination with a number of wealthy and influential characters, from various parts of the United States, were engaged in a desperate and lawless enterprise to invade Mexico, to sever the Atlantic from the Western states, to make himself master of this city, plunder the banks, seize upon the shipping, and under convoy of a British fleet, to transport his army to La Vera Cruz. In prosecution of these objects, to use the language of a memorial, Burr himself was to be at Natchez by the 20th of December, with 2,000 men, and was soon

afterwards to be joined by a body of six thousand more. This information the general said he had received partly by a letter in cypher, addressed to him from Mr. Burr, and partly by a letter from Mr. Dayton, also in cypher, received on the 10th of October last, while at Natchitoches. The other parts of the plan had been communicated to him by accredited agents of Burr, sent for that express purpose.

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things, it was rumoured that the general intended to declare martial law, and that the governor meant to suspend the writ of *habeas corpus*. The former part of this threat was in effect immediately put partially into execution, and the latter part was suspended only for the want of power and from a representation of the folly and danger of such a measure. On the 13th of December, doctor B. Ilman was arrested in the public streets by a military guard, under the orders of general Wilkinson, which was soon afterwards followed by the arrest of Swartwout and Ogden. These gentlemen had been but a short time in the country, and were known but to few of its inhabitants. The extraordinary nature, however, of their arrest and confinement, in open violation of the best privileges of an American citizen, excited some interest in the public opinion, and induced their friends to sue out writs of *habeas corpus* in their favour. The first of these writs was issued by the superior court in favour of Bollman, who had already been hurried out of the country, or at least was so alleged by the general, out of the reach of civil process. The return to this writ was perhaps the most singular in manner and stile of any ever before made to a court of justice. The general's approach to the court was announced by his aid de camp, Mr. Duncan. He appeared at the bar, clothed with all the insignia of military power. He informed their honours, that he took upon himself all responsibility for the arrest of Errick Bollman, and that he had adopted measures for his safe delivery to the executive of the United States, as he would do with all others, without regard to standing or station, against whom satisfactory proof of guilt might arise in his mind. He enlarged considerably upon the extent of the conspiracy; the great and imminent danger to which we were immediately exposed; the wealth, the talents and number of Burr's associates;

and, casting his eyes around upon an appalled multitude, declared, that even within this city, there were many enemies to their country; that treason not only lurked in your hiding places, but stalked proudly through your streets at mid day! The several documents in support of these allegations, particularly Burr's and Dayton's letters in cypher, and parts of the letter which the governor had received from Tennessee, suppressing as the governor had done before him, the name of its author, and whatever related to the general himself! He further said that it was after several consultations with the governor and two of the judges of the territory, viz. Hall and Mathews, that he had hazarded this step, but being contradicted by the honourable Judge Mathews, the general replied, that he had understood him to that effect, and then looking down upon the bar, he called out for two of its members, and denounced them as traitors to their country. The disgraceful scene that followed, should be buried in eternal oblivion. Great God! shall the sacred temple of justice be converted (by an American officer) into a club of revolutionary tumult, and military denunciation? and shall the citizens of freedom look tamely on? Shall the insulted ministers of the law return thanks to its violator, applaud his conduct, bow before him, and kneel at his feet? The general retired, not to the place which he deserved, but in triumph, and the friends of the constitution departed with grief and indignation and despair, to bewail the misfortunes of their country. The effects of this disastrous day were soon every where discovered. Suspicion became identified with treason. Every one conscious of his own innocence and believing the declaration of the general to be true, concluded that others were guilty—public as well as private confidence was lost—individual friendship was destroyed—all the bonds of society were torn asunder—

and public tranquillity as well as domestic happiness were banished from our shores: Broils and party spirit succeeded in their places; and the contention was between the friends of the law, and the advocates for arbitrary power. The people however were still united upon one point—resistance to Burr. A similar return was, in the last resort, made to the *habeas corpus* in the case of Ogden, who after having been once set at liberty by the civil authority, was a second time arrested and confined along with Mr. Alexander, by the orders of the general.

In the mean time guards were placed above the city to arrest and examine all travellers, to stop all boats, examine their passengers, and to fire upon the boats which refused to come to! A detachment of dragoons was sent to Manchac, with the same, and additional orders to break open and examine all letters and other papers found in the possession of travellers.

A second regulation was established making it necessary for vessels and citizens of this territory, as well as other persons, to furnish themselves with passports; and those who neglected to do so, were compelled to return to the city of New Orleans, in search of a document, the necessity of which had never been publicly notified.

While these things were going on, at the Balize and in the country, your post-office was erected into an inquisition; private letters were broken open; the secrets of individuals were disclosed; and the reputation of every honest man exposed to the mercy of every malicious scribbler. The private as well as public conduct of individuals, was watched; and they were alarmed, menaced or intreated, according to the timidity or firmness of their dispositions: secret depositions were taken, without the knowledge of those they were intended to criminate: and characters were to be tried, for acquittal or infamy, before a judge whose own fidelity had long been suspect.

ed. The information, however, from Kentucky, the pretended seat of the conspiracy, did not altogether comport with the fears as to the dreadful situation into which the public conduct of our rulers had reduced this unfortunate city. Boats were constantly descending the river; private communications were daily received, and it did not appear that they were under any great apprehension there, either for their own, or our safety. Burr it is true was wandering through that and the neighbouring states in a suspicious manner; some apprehension had been excited in the public mind, and he had been twice arraigned before the district court of Kentucky, for hostile intentions against the peace of the union, but was acquitted on both occasions. Such was the situation of affairs, when in the afternoon of the 14th of January, general Adair arrived among us. This gentleman it had been reported was to hold a distinguished command in Burr's army. He made his entry into this city about one o'clock alone and unarmed. He took up his lodging at a public boarding house, and being indisposed sent a messenger to the governor to inform him of his arrival, and requesting that information might be sent to general Wilkinson to the same effect. He mentioned that he had left Nashville on the 22d of December, and that Burr was then there with only two flat boats, destined for this city. He had never been in New Orleans but once before, in 1800, when he remained only a few days; and could not, therefore, have any extensive acquaintance with its inhabitants. He had very recently occupied a distinguished place in the councils of the government, and was held high in the estimation of his country, as a man of talents and bravery. About four o'clock on the same day of his arrival, whilst at dinner, a detachment of the regular troops, consisting of one hundred and twenty men commanded by colonel Kingsbury, accompanied by one of the general's aids, posted

themselves before the door of the hotel: Adair was violently dragged from the table; paraded through the streets, exposed to the pitying gaze of hundreds of his astonished fellow citizens, and indisposed as he was, committed to close confinement in a cold, uncomfortable room at the barracks. They beat to arms through the different streets of the city;—all the inhabitants were in commotion;—the battalion of volunteers and a number of the regular troops were ordered under arms; and three other gentlemen, inhabitants of the city, and all of them holding offices under the territorial government, were arrested and conveyed to head-quarters. Two of these gentlemen were liberated by writs of *habeas corpus*, and the other was voluntarily released by the general himself some time after. A few days subsequent to this period, certain information was received of the arrival of Burr in the neighbourhood of Natchez, with thirteen flat boats, loaded principally with provisions, and with only a sufficient number of men to conduct them down the river: no guns, ammunition or other military stores were found on board, more than is commonly met with in Kentucky boats. And from that time to his surrendering himself to the civil authority, it does not appear that he was joined by any additional force.

Notwithstanding Burr's surrender, however; notwithstanding the most unequivocal evidence of the feebleness of his force and the failure of his plans; notwithstanding the conviction in the mind of every man of reflection of the want of legal power in territorial governments, to suspend the writ of *habeas corpus*; the governor of the territory addressed to this house on the 10th of February, a message recommending that measure, and assigning as his reason for so doing, that he had been "recently advised of the approach to this city of an agent of the conspirators, of his name, the route he had taken, and the object of his mission; but that he had it not in his power to

adduce such proof as would justify a civil magistrate to commit him to prison." An American citizen against whom suspicion was entertained, but of whose guilt no proof could be adduced, was expected in your city, and it was probable that he would be *rescued* from that suspicion by the application of the writ of *habeas corpus*, and placed upon a footing which the laws of your country entitled him to, and you are called upon by the executive of this territory to take away not only from him, but from every other citizen, the great constitutional bulwark of the liberties of the American people. The fate of this message is well known. But, sir, to the shame of this house, let me ask, what would have been its fate had not the minority resorted to the measure of consulting the judiciary of our country. During the time of three days of secret debate which this important question occupied, it was evidently seen that a large majority of this house, was determined at all hazards (I will not question their motives) to second the views of the executive. Some of your members were bold enough to say, that the governor had recommended the measure; and that it must therefore be proper. I am, however, both for myself and my country, grateful to them, for yielding their opinions to superior wisdom; and leave it to the world to decide how far the governor was justifiable (or ignorant of your powers) in recommending, for the apprehension of one suspected individual, the suspension of the dearest privilege of an American citizen.

From the view I have taken of this subject, Mr. Chairman, you will not be induced to believe that I have any doubt of the existence of a plan to subvert our government, and to invade the dominions of Spain. On the contrary, sir, I most firmly believe it; I believe that such a plan has been long in agitation, that it has taken deep root and spread through a great portion of the United

States. But sir, I am persuaded from the facts I have detailed, that I can convince you, this honourable house and the whole world, that its origin is not to be found in Burr's cyphered letters, in Dayton's communications, or in Burr's agents to Wilkinson; and that its defeat is not to be ascribed to the affected patriotism either of general Wilkinson or governor Claiborne. The officiously lopping off limbs to preserve the body may answer the ambitious, avaricious purposes of an ignorant quack, but will never meet the sanction of a sound intelligent physician, who upon taking a view of the whole distemper, clearly sees that such mutilations can have no other effect than to weaken the body, and hurry the patient to death. I have no idea that your constitution is to be preserved by trampling it under foot—that your laws are to be maintained by setting them at defiance. No man will doubt that Burr was a conspirator, and if we believe Wilkinson, that Dayton and many others were concerned with him. Let us look at his conduct. If I am not mistaken the last time he met the general at the Federal City, he accosted him nearly in the following words: (my authority is governor Claiborne)—General, what are you about—what has become of your ambition—your love of glory and dangerous enterprise? I possess these qualities, replied the general, in the same degree I ever did. Then what are you doing here? said Burr. Point out to me a field, said the general, and I am your man. Burr pointed to Mexico—and the remainder of the conversation was in secret, and is still unknown to us. The general is appointed to the government of Louisiana, and we shortly afterwards find Burr on his way to that country. Why this visit? Was it for the pleasure of traversing a wilderness of several hundred miles in extent? Was it to examine the dreary plains of the Indiana Territory? To take a view of the wretched villages of Kas-

kaskias or Kahokia? Or was it to see general Wilkinson? From St. Louis he descends to New-Orleans, not as an ordinary traveller, but in an elegant barge, manned by the troops of the United States, soldiers under the general's command. To whom is he introduced, and in what style? To the old friends of the general, and in terms of the highest recommendation, both as to his talents and probity. He spends a few days here—returns to St. Louis—talks over with the general the plan of invading Mexico (ridicules a foolish club he had heard of at New Orleans, established upon patriotic principles) and departs for the Atlantic states. The next news we hear of him is at Philadelphia, in the month of August, from whence he writes to the general, not as you or I would write, but a letter in cypher, a language unknown to any one but themselves, in which he states that he had obtained funds, and actually commenced the enterprise—an enterprise in which Wilkinson was to be second to Burr only! In which Wilkinson was to dictate the rank and promotion of his officers. Examine this communication, sir, and compare its contents with your knowledge of the human heart. What internal evidence does it contain? Put your judgment under the control of that evidence, and follow me from Natchitoches to New Orleans, and the honourable gentleman from Acadia will lose his motion. What did the general do on the receipt of Burr's letter? He writes to the president of the United States, giving him some account of the scheme. This was proper. But what ought he to have done further? He knew that Burr was in Kentucky, and that the *enterprise* had not yet made much progress. He knew that the documents in his possession, if forwarded in legal form, to the governors of Kentucky, Tennessee and Ohio, would be sufficient to enable the constituted authorities of those states to seize the traitor and stifle

at once the whole nefarious plan. He knew from his own correspondence with Burr that these documents might have been sent in time to meet him there, to surprise his army, if he had one, and capture its chief. Did he do this? No, sir; whilst the honest state of Kentucky was groping in the dark for testimony—whilst she was endeavouring to get some clue for the discovery of Burr's guilt, general Wilkinson, in possession of damning proofs against him, was not only silent upon the subject, but wrapped himself up in mystery and suspicion; and took such a stand as placed his conduct, and the whole of his operations in the most equivocal point of view. What would have been the fate of Burr and his accomplices, had the courier, Mr. Smith, on his way to Washington, left a copy of Wilkinson's testimony with the governors of Tennessee, Kentucky and Ohio? He passed through Nashville about the middle of November, previous to Burr's trials in Kentucky, and thirty or forty days previous to his departure from Tennessee. What was the general about? We find him at Natchez on the tenth of November soliciting the acting governor of the Mississippi Territory for five hundred of his militia. But the governor it seems had the astonishing insolence to demand for what purpose these men were wanted? The general refused to satisfy his curiosity, and the men were not granted. Why this demand on the part of the general? Burr was expected at Natchez in a few days with two thousand troops, and therefore the governor of that territory must send five hundred of his militia to New Orleans—he must disarm himself, deprive his country of its only force, and leave its inhabitants unprotected—a prey to their own slaves, or the neighbouring savages—and for what? Because in a short time a powerful enemy was to be at his gates. Further, sir—why did the general conceal from governor Meade the projects of

Burr? Was it to put him on his guard, to enable him to make a stand against the invader? or was it to lull him to sleep, that his country might be found open and defenceless, and the road to New Orleans free from obstructions? I call upon the gentlemen, sir, to answer these questions. I will now proceed to New Orleans. A few days after the general's arrival in this city, governor Claiborne did me the honour, under the most solemn injunction of secrecy, to disclose to me all the particulars of Burr's projects, and to consult me as to the best measures that could be adopted for the safety of the country. He seemed to be confounded with fear and *astonishment*, and observed from the general's account, Burr had many powerful friends in this city. He asked me whether I had any knowledge upon that subject; and intreated me if I had to communicate it to him with that candor and love of my country which he did me the honour to say he knew I possessed. I replied that I never had heard of such a scheme, and that I firmly believed that there was not a man in the territory, (the agents and officers of foreign governments excepted) who would not risk his life for its defence—that upon the integrity of the union depended the liberties not only of this territory, but of the whole American empire, and that I was warranted in saying from a knowledge of the public sentiment and the character of the people at large, that Burr nor no other man either had, or would ever be able to find among the people of Louisiana, friends to a scheme pregnant with so much ruin and marked with infamy. I further observed that he himself must have heard much conversation upon the subject of a war with Spain, and an invasion of Mexico in case of that event. That this was a favourite topic with all the true Americans in this country, as well as with many of the native Louisianians—that some time since, when from the political relations between the United States and Spain, every man of sense was appre-

hensive that war would be the result, a club was formed in this city, called the Mexican society—that it had for its object collecting information relative to the population and force of the internal provinces of Spain, which in the event of war, might be useful to the United States—that I was a member of that club, and the principal members of it were men of great talents and high standing in society, and distinguished for their zeal in support of our government. But I assured him upon the honour of a gentleman, that the society had ceased to exist for many months—that we never had heard of Burr's plans, and that neither directly or indirectly did I ever hear from him or any other man upon earth, any propositions hostile to the interests of the United States, or any other nation with which we were at peace. His excellency told me that he had not himself seen the original documents upon which the general founded his calculations—but that he had received verbally from him a full and satisfactory account of them. I suggested the propriety of his obtaining certified copies of all the important facts; and of his immediately transmitting them to the governors of the upper states and territories, as well as to the president of the United States. I advised him immediately to dispatch couriers for that purpose, and offered my services, to set out the next day, if necessary, to Kentucky. I told him that I had confidence in the patriotism and integrity of the upper country; and as the general had neglected to give them information of their danger, it might be yet time; and that at all events it was his duty to do so. I suggested the propriety of his taking a strong ground; calling out and putting into actual service several hundred of his militia, and of his retaining them under his own command. I opposed the declaring martial law, or the suspension of the writ of *habeas corpus*. I considered such measures unnecessary, illegal and calculated to excite

alarm, destroy all confidence in the civil authority, and throw the whole government into the hands of the military chief. I took a view of the general conduct of that officer, and although I hoped, and was willing to believe that he might be actuated by the best of motives, yet I thought his conduct not calculated to inspire that confidence which the public safety so urgently required.

In giving these opinions I discharged my duty—but the executive thought proper to take a different course. We see him immediately afterwards consenting to, and approving of unlawful military arrests, and the transportation of your fellow citizens. You see him advising an illegal embargo upon your shipping, transferring to the general the command of the battalion of Orleans Volunteers without their consent or knowledge, and you see this respectable corps converted into constables and catchpoles—you see them employed in dragging their former friends and companions from their houses, parading them through the streets to their places of confinement. You see them posted on the road engaged in the odious task of hunting down their fellow citizens, searching their pockets, breaking open their letters and acting as spies upon their conduct. Could you, sir, approve of such measures *as these*, and will you now withhold a knowledge of them from the general government? I ventured from the beginning to refuse them my approbation; and when acting under the obligations of executive favour, and in spite of threats and intreaties I dared upon this floor to stand up in defence of the violated rights of my constituents, I flatter myself that I shall now, having got rid of those obligations, be intitled to your indulgence for the time I shall take up, and your candid examination of such arguments as my feeble talents may enable me to make use of. We have seen, sir, that suspicion alone was sufficient in those times to insure your

arrest. If you dared assert from your knowledge of the patriotism of the western states, that Burr would not succeed—that he never would find in Kentucky a sufficient number of men to put his plans into execution,—you were accused of wishing to lull the people into a state of dangerous security; to stifle the vigilance of government; and were therefore denounced as a friend to Burr. If you, on the other hand, gave implicit confidence to all the general's information; if you believed that Burr could easily raise six or ten thousand men, and that such was his character and talents that with that force nothing could stop him, you were equally his friend, and a traitor to your country.

If you admitted that danger existed, but avowed the opinion that the laws of your country were adequate to its suppression, and that your courts of justice were open; you were told that it was necessary “to anticipate the tardy process of the law”—that such old-fangled opinions were not applicable to the present times; and advised to conceal them within your own bosom, lest you might expose yourself to the vengeance of the new and merciless despotism. For my own part, sir, I never could adopt this doctrine. I have from my infancy adored the principles upon which the American constitution is founded, and under that constitution I doubt the possibility of a case in which any officer of the government, however high his station, however pure his character, can be justified in a departure from the written laws of his country; much less in a flagrant, and what appears to me, a wanton and unnecessary violation of them. If you once admit such a principle as this, you lay the foundation for despotism; and may bid adieu to liberty and the reign of law—you put it in the power of any ambitious man, of any idol of the people, of any powerful military chief, to suppose such a case, *to imagine pub-*

lic danger, make it a pretext to trample your laws under foot—seize upon your government, administer it awhile according to his own fancy, and finally erect upon its ruins just such a system as Cæsar did in Rome; as Bonaparte has done in France. In this way all the governments in the world have been overturned; and in this way, if you countenance such doctrines, the liberties of America will be lost. What does it matter to me, Mr. Chairman, if this be effected by Aaron Burr or James Wilkinson. For the sake of argument, however, I will admit the position—I *will suppose* that a case may happen where “the tardy process of the law,” may be “anticipated”—when a governor may abandon, and a general of your army may and ought to usurp all power! Was that our case? To what real danger has our country been exposed? Look at Mr. Burr in Kentucky—follow him down to Natchez! How many men had he ever collected together? What quantity of arms or other military stores do you find him or his associates in possession of? You have heard of thirteen boats being seized near Marietta, loaded with provisions and presumed to belong to Burr’s party. Admit the fact. But how many men were on board these boats? and what arms had they? No arms at all, and not more men than were necessary to row these boats to Nachez. On the 22d of December he leaves Nashville with two boats; at the mouth of Cumberland he is joined by eleven more; and with this formidable force he arrives about the 10th of January, at Bayou Pierre—thirteen boats then, loaded with provisions, having on board from fifty to one hundred men, and about forty stand of arms, which appear to have been brought along with them for the purpose of killing turkies and wild geese for this mighty army—to oppose which you are called upon, (and many of you have already pledged yourselves) to justify general Wil-

kinson and governor Claiborne in the secret as well as open violation of every thing that is dear to the liberties of man. Many of you have already hailed the general as the saviour of his country, have bound yourselves down to approve his conduct, and call upon us in the face of offended heaven and the prostituted rights of your country, to go along with you by rejecting the memorial. Permit me to ask, sir, (allowing every thing that has been said about the nature and extent of Burr's plans to be true) who is intitled to that sacred epithet? Who has really been the saviour of our country? Who has defeated the schemes of Burr? *Have the operations of general Wilkinson and governor Claiborne extended beyond the limits of this territory? Have the dreadful effects of the wounds which have been inflicted upon your constitution penetrated into the enemy's camp? was Burr's progress arrested? Was the severance of the union, or the invasion of Mexico prevented by concealing his plans, embargoing your shipping, withdrawing your troops from the upper country, demanding governor Meade's militia, insulting your courts of justice, denouncing your fellow citizens as traitors, arresting and transporting them without even the form of a trial, filling the public mind with constant alarms, destroying the civil authority, or finally by trampling under foot every principle of justice and of right?* No, sir! You owe your salvation not to general Wilkinson or governor Claiborne, but to the patriotism and integrity of the people of Kentucky; and to them should your altars be erected. You owe it to that love of liberty and independence; to that attachment to their country; to that confidence in the honest administration of the general government, which glows in the minds of our western brethren. You owe it to their love of those sacred principles which you have not only seen torn from you without a murmur, but for the loss of which you have kissed in

humiliation the ravisher's feet, and wish to place upon his head a crown of immortal honour. If Burr had had to contend with such sentiments in Kentucky; if he could there have usurped with impunity the powers which your superiors have done here, what would then have been your situation? Who in that case would have been your saviour? If general Wilkinson had been upon the Sabine; if he and his whole army, however brave and loyal they may be, had been in the remotest corner of the globe, Burr never could have succeeded. His lawless schemes would have been defeated as they have already been. But had he even succeeded in passing Natchez with his miserable force, what would have been his fate here? Ask your boys and your women in the streets. They would have been sufficient to have given a good account of him. But, sir, it has been asked, with some triumph, suppose general Wilkinson instead of opposing him, had acted as Burr expected, and as the general says he had a right to expect, in concert with him; what would have been the result? I leave this question to be answered by the general's advocates themselves; and I yield either to him or to them, all the advantages they can draw from it.

SPEECH OF MR. ROSS,

DELIVERED IN THE SENATE OF THE UNITED STATES, FEBRUARY 24th, 1803: ON HIS RESOLUTIONS, RELATIVE TO THE FREE NAVIGATION OF THE MISSISSIPPI.

THAT violation by the king of Spain, of the treaty between him and the United States, commonly called the occlusion of New Orleans, attracted the attention of congress in 1803. The case was briefly as follows.

Spain holding the territory on the west of the Mississippi, extending to the Gulf of Mexico, and on the east of it, south of the southern boundary of the United States in the thirty-first degree of north latitude, was consequently the proprietor of both sides of that river. The impossibility of ascending the Mississippi in sea-vessels, to a height convenient to receive the produce of our western states, had convinced our government of the necessity of obtaining from Spain the right to deposit their produce on their territory, from whence it was conveniently accessibly by our ships, and also of securing to them the free use of this highway to market. These objects were obtained by the treaty concluded with Spain, the 27th October, 1795; by the 22d article of which it stipulated that his catholic majesty will permit the citizens of the United States, for the space of three years from that time, to deposit their merchandize and effects in the port of New Orleans, and to export from thence, without paying any other duty, than a fair price for the hire of the stores. And his majesty promised thereby either to continue the permission, if he found during that time, that it was not prejudicial to the interests of Spain; or if he should not continue it there, to assign them on another part of the banks of the Mississippi, an equivalent establishment.

In violation of this treaty the intendant of New Orleans, the officer intrusted with the commercial concerns of the province, did by proclamation in October 1802, interdict the American right of deposit at New Orleans, without assigning any other equivalent establishment; and the governor general of Louisiana explicitly vindicated the measure.

This produced an immediate great loss, to a portion of our citizens, and was considered by many as the com-

mencement of measures to deprive us entirely of a place of deposit and to obstruct our navigation of the river.

To enable congress to act upon the subject, Mr. Ross, on the 16th February, 1803: offered the following resolutions.

Resolved, That the United States of America have an indisputable right to the free navigation of the river Mississippi, and to a convenient deposit for their produce and merchandize in the island of New Orleans:

That the late infraction of such their unquestionable right is an aggression hostile to their honour and interest:

That it does not consist with the dignity or safety of this union to hold a right so important by a tenure so uncertain:

That it materially concerns such of the American citizens as dwell on the western waters, and is essential to the union, strength, and prosperity of these states, that they obtain complete security for the full and peaceful enjoyment of such their absolute right:

That the president be authorized to take immediate possession of some place or places, in the said island, or the adjacent territories, fit and convenient for the purposes aforesaid, and to adopt such measures for obtaining that complete security, as to him, in his wisdom, shall seem meet:

That he be authorized to call into actual service any number of the militia of the states of South Carolina, Georgia, Tennessee, Kentucky, and Ohio, and the Mississippi Territory, which he may think proper, not exceeding 50,000. and to employ them, together with the naval and military force of the union, for effecting the object above mentioned, and that the sum of five millions of dollars be appropriated to the carrying into effect the foregoing resolutions, and that the whole or any part of that sum be paid or applied on warrants drawn in pursuance of such directions as the president may from time to time think proper to give to the secretary of the treasury.

On the 23d, these resolutions were taken into consideration. On the 24th, Mr. Wright of Maryland opposed the resolutions in a long speech; upon which Mr. Ross rose and spoke as follows.

SIR,

THE propriety of introducing these resolutions becomes every day more apparent. Since they have been laid on the table, our national councils have taken a new direction, and assumed a much more promising aspect. Until these resolutions were brought forward, there has been no military preparation; no proposal to detach militia; to build arsenals on the western waters; to provide armed boats for the protection of our trade on the Mississippi. I am happy in seeing gentlemen on the opposite side, pursuing a more vigorous course than they were at first inclined to adopt, and I hope they will, before long, consent to take stronger and more effectual measures for the security of what is in hazard.

As I have, on a late occasion, stated at large my reasons for presenting these resolutions, I will not detain the senate with a repetition of them, except where they have been misrepresented or distorted during the debate. I cannot suppose that any gentleman would intentionally mistake what has been said; but it was very certain that sentiments and assertions have been ascribed to me, in the course of the discussion, not warranted by any thing I have advanced.

Every gentleman who has spoken in this debate, excepting the honourable gentleman from Maryland (Mr. Wright) admits that the United States have an indisputable right to the free navigation of the river Mississippi, and to a place of deposit in the island of New Orleans. All agree that this right is of immense magnitude and importance to the western country. All agree that it has been grossly and wantonly violated—and all agree, that unless the right be restored and secured, we must and will go to war. Upon what then do we really differ? Upon nothing but the time of acting. Whether we shall take measures for immediate restoration and security, or

whether we shall abstain from all military preparation, and wait the issue of negotiation. There is no disagreement but upon this point; for if negotiation fails, every man who has spoken has pledged himself to declare war.

A number of the objections made against the adoption of measures we have proposed, deserve to be noticed.

The honourable gentleman from New York (Mr. Clinton) when composing his speech, has made an elaborate research into ancient and modern history, for the purpose of showing what had been the practice of nations. He has collected all the objections together and classed them under three heads. Other gentlemen who have spoken in opposition have taken nearly the same ground, and made in substance the same objection: I will, therefore, follow the arrangement made by the honourable gentleman (Mr. Clinton) and I am persuaded that it will be easy to show, he has in many instances mistaken the most material features of the authorities he has adduced, and more than once misstated the positions which I undertook to refute. He has, however, admitted the magnitude of the right, that it has been violated, and that if negotiation should fail we must go to war. He has made objections under these three heads and insisted:

1st. That the infraction may be unauthorized.

2d. That negotiation ought, in all cases, to precede the employment of force.

3d. That reasons of policy should dissuade us from using force at present, even supposing we have just cause of immediate war.

The first objection has already been amply refuted by the gentlemen from New-Jersey (Mr. Dayton), the gentleman from Massachusetts (Mr. J. Mason), and the gentleman from Delaware (Mr. White). I will only remark in addition that whether authorized or not, is not now very material. If authorized, the temper, the design must certainly

be that of an enemy, and you should act accordingly. If unauthorized, seize the culprit and send him home to his master, who will punish him for a breach of duty. Let him answer with his head for embroiling two friendly nations who wish to live in peace. Why wait till you send three thousand miles and enquire whether he had orders or not. He is visibly a wrongdoer: remove him, and protect what he would wrest from you. No man when proceeding on the highway to market, and stopped by his neighbour's servant, would send out into the country to enquire whether his master had authorized the outrage. No, he would punish and remove the aggressor and proceed on his journey, leaving the circumstance of orders, or no orders, to be settled between himself and the master afterwards. Besides, in this instance, the person inflicting the injury declares he has no right to the country. If so, why make enquiry whether he has orders? No orders could give him authority to interfere with your unquestionable right, where his master pretends to no right himself.

Under this head of aggression and spoliation, the senator from New-York (Mr. C) in a tone and manner not very decorous in debate, has declared it to be within my knowledge, that indemnity has been provided by Spain for the spoliations committed upon our trade; and yet the assertion has been made that Spain has refused all redress for injuries of that kind; while the honourable gentleman alludes to documents before the senate which are now under the injunction of secrecy.

Sir, I have seen those documents, and I now repeat and re-assert, that I know nothing to warrant the opinion or belief that Spain will make compensation for all spoliations of our merchants, or for the greater part or mass of them. I certainly never did say that Spain had refused all redress; for it will be recollected by all present, that I expressly stated, the other day, the injuries done to us by the Spa-

niards themselves in every place they had found our flag; *and that our vessels were carried into their ports by French cruisers, condemned without the semblance of a trial, and our citizens thrown into prison.* That if we took possession of the country on the Mississippi we should have an ample fund in our hands to compensate all our merchants who had suffered from the conduct of the Spaniards: That the merchants would willingly accept such an advantageous offer: and that otherwise there was no reason to hope that they would *all be indemnified:* and I now return to that gentleman his own words, that *he* does know, and must be sensible, from the very documents he has alluded to, that there is little if any hope that the great body of injuries and losses sustained by our merchants from the Spaniards in different quarters of the world, and the conduct of the French in Spanish ports, will ever be compensated or paid by Spain, unless in the mode that I had suggested.

The same gentleman has said, that we have no facts respecting Spanish spoliation authenticated and reported to us, and offers this as a further reason for delay and negotiation. The facts of spoliation, and vexatious, oppressive conduct towards our merchants, and seamen, as well on the sea as within the jurisdiction of the Spanish government, both in Europe and America, are so notorious and of such extent and continuance, that no man can really doubt, or with truth deny the aggravated series of outrage and oppression which we had experienced. Although the executive or other officers of government may not have collected and reported these complaints to this house, yet this forms no excuse for the aggressors, much less a reason why we should abstain from giving attention to them while considering indignities of another description. But, that the gentleman may never again be able to say that he had met with no authenticated case of spoliation by the

Spaniards, I will now produce and read one to the senate, which has been delivered to me for the purpose of obtaining the aid of our government to get reparation. The men who have been robbed, were industrious inhabitants of the western country, who lived near Pittsburgh. They descended the Mississippi with a cargo of flour, and finding but a low market at New Orleans, shipped their flour on board of an American vessel, and after being two or three days at sea, were taken by Spanish vessels, carried into Campeachy, their flour sold, their captain cast into prison, themselves restrained of their liberty; nay, sir, several of them died in their captivity; and those who returned home had no allowance made to them by the Spaniards for their property thus unjustly captured, and of course they only returned to witness the ruin of their families by a loss of property which they had not the means of paying for, having purchased on credit. There can be no excuse for the capture; these men lived in the interior country, they were cleared out from a Spanish port, in an American vessel: yet all these circumstances could not save them from the rapacity of the Spaniards.

[Here Mr. R. read the protest of several American citizens before Mr. Morton, the American consul at Havana, stating the capture of their vessel, their captivity at Campeachy, the loss of all their property, and that they lived in the western country, from which they had gone down the Ohio with this flour to New Orleans.]

Herein is a case of prodigious hardship and oppression arising out of the very trade and intercourse which the Spaniards have at last undertaken to obstruct and destroy; and therefore I think it proper to be brought forward during this discussion, to show the temper and the conduct of these people towards us before they had proceeded to the last extremities.

The second objection taken by the gentleman from

New York (Mr. C.) and indeed by all who have spoken against the resolutions, amounts to this: That every nation is bound to demand satisfaction for an injury before it employs force for redress; and that a refusal of satisfaction must precede the use of force.

However humane or salutary the general principle may be, certainly it does not hold universally, or to the extent that gentleman contends. No book, no writer of authority, has ever contended that this principle should operate when the essential rights, the well-being, or the peace of the country are exposed to danger; and the rule has no application but to inferior or minor rights of society, where delay and negotiation might be safely resorted to.—No man can reasonably say, that this rule would hold where an army was marching to your frontier or landed upon your territory; or a fleet was blockading your harbours, or demanding contribution from your sea-ports.—Such cases admit of no negotiation: the intention of the assailant is manifest, the danger imminent, and immediate use of force and hostility unavoidable by the most peaceable nation. It will be said that these are extreme cases and only form exceptions to the general rule.—They certainly demonstrate that the rule is not so general as gentlemen contend for, and when the case at present under consideration is carefully examined, it will be found among those essential and all important rights of the nation, which, when attacked, demand that immediate force should be employed to repel the assailant. In cases of invasion, the mere possession of a small portion of your soil, is not the primary consideration; you are impressed with the approach of further and more serious injury. The hostile intention is manifest, the act such as to leave no doubt, and your right such as can never be abandoned. So here, though there be no actual aggression within the limits of your territory, yet you have a territorial right attached to your soil and constituting its only value, which is directly

attacked and destroyed. Of what value is the territory when stripped of this right? Where is your independence, where is your sovereignty in that country without the unrestrained exercise of this right? Without it the mere soil is of no value. It is an attribute inseparable from the substance. To attack it, is to attack your very existence, for it is the great artery of the western country, a stoppage in the circulation through which, endangers convulsion and political death. The destruction of this right is a greater calamity than a blockade of a sea-port, or even a landing on the Atlantic coast.—The mischief is incurable. Shall it then be said, when this vital part of the nation is assailed, that you ought to wait for information of the intent? Will you not enquire into the motives? Will you not employ force to resist the attack, although you may be undone before you can receive an answer? Will you hazard convulsion and dissolution, because possibly the aggressor has reasons to offer for the outrage that you do not yet know?—This cannot be wise, it cannot be the course which national honour or safety calls upon us to pursue; because you never can abandon the right now denied and wrested out of your hands; you can no more abandon it, than any other portion of country within your territorial limits, when invaded by an enemy.

But in whose favour is this delay asked? With whom are you going to negotiate for reparation of the injury? Why, with those who, by their own confession, have no right in the country from which they exclude you. When you inquire of the court of Spain what has led them to this outrage, they may reply, we know and care nothing about it; that country is no longer our's, we have abandoned all claim to it, and ordered our officers to withdraw.—The title is now in another. Will this satisfy you? Will this redress the injury? Where will you go next? Or how long will you wait for an answer to the question of who turned us out of doors and keeps us out? You have the

same reasons for a second as for the first delay; and in the meanwhile you are out of actual possession, and the wrong-doer is in.

But, sir, we are triumphantly told, that it has been the practice of all civilized nations to negotiate before they go to war. Round assertions, like general rules, are always to be received with exceptions and great allowance. I dispute the fact; although my argument does not need this kind of aid; for I am persuaded there is no precedent of an independent nation relying upon negotiation alone, in such circumstances. If you go to books, or to the example of other countries, you will find no dictum of a writer, nor instance of a state, that will justify the course now held by gentlemen on the other side. For wherever the nation has been invaded, its vital interests attacked, its existence drawn into hazard, its essential rights exposed to immediate destruction, every writer and every state will bear you out in resorting, without delay, to the strongest means in your power for repelling the aggressor.

The conduct of the Romans has been more than once mentioned—Their history is handed down to us by themselves, and even in that we shall too often find, that while their ministers of peace were affecting to demand reparation, the consul had advanced with his eagles to the frontier, and was ready to enter the country where the negotiation was pending; we shall find that they negotiated often and long, when it did not suit them to commence an immediate attack; and the negotiations, especially when at a distance, were protracted, until their armies had been recruited, wars nearer home ended, and every thing ready to strike a decisive blow.—But you have no instance of negotiation without military preparation, where the Roman territory was invaded, or a Roman treaty violated.

Leaving antiquity, the honourable gentleman (Mr. C.) has adduced and extolled the example of England in mo-

dern times, and traced her through many scenes both of negotiation and war. But he did not dwell upon her conduct in the beginning of the war of 1756, when all the commerce of France was destroyed by a general sweep, without a previous declaration of war; and yet this was so certainly the case, that the gentleman must well remember it formed a subject of complaint, and was used to protract the negotiation for a general peace in 1763.—He has also forgotten their conduct towards the Dutch during our revolutionary war; and their late armament against the Danes.—His comments also upon the conduct of their ministry in 1762, are peculiarly unfortunate, because we know, that the nation was afterwards actually obliged to declare war against Spain, when she had full notice of their intention, and time to prepare for the attack; whereas had war been waged when the hostility of Spain and her secret alliance with France were first ascertained, they would have possessed prodigious advantages which were lost by ineffectual negotiation and delay.

I will not follow the gentleman to Nootka Sound, to the Bay of Honduras, or the Musquito Shore; but I will at once admit, that in cases of minor rights, of spoliation upon commerce in time of war, nay in all cases that do not involve the well being, or national independence, negotiation and amicable adjustment should be resorted to; and demand of reparation should precede actual hostility. I will even say, that were the Spaniards to cross the Mississippi at the Falls of St. Anthony and build a fort on our side of the river, place a garrison in it, and thus actually invade our territory; in my opinion we ought to negotiate and demand explanations before we sent troops to demolish the fort. Although the act would justify the immediate use of force, yet the station is so remote, and of so little importance in the use of it, that friendly means might be safely and wisely resorted to in the first instance.

Quitting Europe, the gentleman exultingly appeals to the usages of our own country, in cases which he alleges were either similar to, or stronger than the present. The name of WASHINGTON is introduced to silence all further dispute on this question!—Sir, I reverence the authority of that great man's official conduct.—He was the father of his country, the terror of its enemies, and the ornament of human nature. He is now gone to mix with the heroes and sages of other times and nations in a happier world; but to was easily foreseen that those who seldom agreed with him in his life, would be the first after his death, to fly for shelter to his example, when overtaken by calamity or misfortune! That man led the armies of this country to victory—to independence. He knew better than any man the interests, the feelings, the dispositions of the people.—He witnessed the origin and progress of complaints on both sides respecting the inexecution of the treaty of peace between us and Great Britain. We justly reproached them with detention of the western posts, and their refusal to deliver our slaves, as stipulated by treaty:—They replied that we did not pay them our old debts. These disputes became the subject of negotiation, under the old confederation, and we had a minister in that country who attempted an amicable adjustment. When General Washington came to the head of our present government, he sent another minister to that country, and while he was endeavouring a peaceable accommodation, a storm broke out in France, which soon spread beyond its own boundaries, and involved the neighbouring nations in war. The rulers of France, wishing to engage us in their quarrel, sent a minister to this country with express instructions to embroil us, if possible, in this desolating war. Unfortunately that minister possessed abilities and disposition well adapted to such a mission. He landed in a part of our country remote from the seat of government, and instantly began

to issue his commissions to our citizens not only to equip privateers and plunder the commerce of nations with whom we were at peace, but to enlist men and raise a military force within the United States, for the purpose of attacking the possessions of Spain in Florida. He travelled onward from Charleston towards the seat of government, making proselytes as he advanced, and gaining new adherents at every step of his journey. He was received with acclamations of the liveliest joy in the capital city of this country, and after employing all the soothing art of fraternization, civic feasts, and public spectacles, he proceeded, as before, with his commissions, and actually insisted upon and exercised the right of bringing into our ports and selling prizes taken from nations with whom we were at peace. This minister had the address to seduce many of our citizens to enlist under his banner; and but too many, even of our respectable men in high employment, applauded his conduct and gave his measures a countenance they did not deserve. All ranks seemed pleased with the zeal and the boldness of the minister's mind, and an union of this country with France in the war seemed inevitable, as no effectual steps had been taken to restrain this wild, extravagant condition of things among us. I mention not these events with a wish to hurt the sensibility of any one, for I know that this country was then without experience; we had never before been in the relation of neutrality towards powers at war, and we entertained a lively affection for France, because she had aided us in the revolution war, and was then, as we thought, contending for liberty herself. The respectable men who, led away by their feelings, joined in the phrenzy of that time, would not now display such opinions, or enter upon any public act to commit or endanger the peace and honest neutrality of their country.

Very unfortunately, however, we had then here a minister from Great Britain who was but little inclined to pro-

mote good understanding, and who probably transmitted discoloured accounts of all that passed from day to day. Things were sufficiently wrong without any exaggeration of their enormity. When the accounts reached England, was it wonderful that they considered war as begun? Was it strange that they should count upon hostility, when the acts of the people assumed but one complexion; when the government had not taken means to do justice and prevent such injustice; where their ships were sold by their enemies, and every indignity put upon their subjects? Hence we may trace the orders for spoilations; hence the talk of Lord Dorchester to the Indians, and the other aggressions on the western frontier, which, however unjustifiable, were not altogether without provocation.

In the meanwhile, the French minister increased in his activity and boldness of enterprise, under the very eye of our government; he multiplied his complaints against the executive, and his caresses and professions upon the people, until at last, confident in his numbers and support, he set the president at defiance, and threatened an appeal to the people. At that awful crisis of delusion, WASHINGTON came forward, Moses like, and put himself in the gap between the pestilence and the people.—He demanded the minister's recal, and he effected it. He arrested the hands of our citizens who were armed to plunder in time of peace—he enforced the observation of the rules of justice and neutrality. When these things became known in England, they produced a revocation of the orders to plunder our merchants. But the havoc and destruction had been dreadful; we were highly and justly incensed, the blood of both nations was up—it had scarcely cooled, and was easily roused to be ready for war. If the British had not recalled their orders of November, 1793, we undoubtedly should have gone to war.—It would have been unavoidable, nay absolutely necessary. But when the revocation of

those orders was known here, our president considered that our own conduct had not been perfectly regular; there was some cause of complaint against us, in the midst all the just complaints we had against the British cruisers; there were also old differences which had created great uneasiness between the two countries. In the recent causes of quarrel we had been the first in suffering improper acts to be done by a foreign agent within our own territory, which we ought to have prevented as neutrals.—Under all these circumstances, being already engaged in an Indian war, he resolved to try negotiation.—An envoy extraordinary was accordingly sent.

How does all this apply to the present case? There had been old, unsettled differences with England—our's with Spain were settled by the treaty of 1795. There were horrible spoliations upon our trade by Britain, but we had permitted acts towards them with which we were obliged to reproach ourselves. Spain has also spoiled our commerce, and to an immense extent, without provocation. For that, the case of England would say negotiate, and we have actually been negotiating. But had England blockaded your harbours, had she shut out half a million of your people from access to the ocean, had she closed up the Chesapeake or the Delaware, would there have been negotiation? No. You would, you must have had immediate war. Such an invasion of the sovereignty and independence of the country would have left no hesitation in the mind of any man; but fortunately as our affairs then stood we were not obliged to resort to hostilities. The man of high talents who undertook to negotiate, succeeded in forming a treaty between the two countries.—Such, however, were the passions of the times, that the negotiator was grossly calumniated. The treaty was opposed by the formidable array of all the artillery of popular opinion organized in town meetings, played off along the coast

from Boston to Charleston, under the direction of the ablest engineer in this country. Public opinion was again shaken, but finally peace was preserved, the treaty went fairly into execution, and even the negotiator was elected their governor, by the people of his own state, where he presided for a long time with honour to himself and infinite advantage to the interests and peace of society, until at length he retired from public life, leaving an example which will always be useful for imitation, and serve at the same time as a severe reproof to those who may materially depart from it.

Our differences and negotiations with England, then, furnish an interesting and serious view of the course we have taken in troublesome times, but certainly do not present any thing like the present case. For although they actually held our western posts and built a new fort at the foot of the rapids of Miami, yet, we had never been in possession of those posts, we had not purchased the country from the Indians, we had no settlements near to it, no great portion of our citizens were obstructed or cut off from the free exercise of their rights, and there were mutual complaints, perhaps mutual enquiries, between the parties, which seemed to require negotiation as the only mode in which they could ever be terminated.

Next comes our difference with Spain. To this it may be answered briefly:—That we made a treaty with that power; difficulties arose respecting the execution of that treaty; we had not then been in the possession or exercise of the rights claimed under the treaty. The Spaniards delayed and evaded the execution, in a very unjustifiable manner. But the administration of that day did not rely upon negotiation alone; they ordered troops to the Ohio, and had the Spaniards persisted in their refusal, those troops would have acted decisively, without any new application to the court of Spain. They saw the approach-

ing storm; they entered upon the execution of the treaty, by running the line, and giving up the posts; and, if the war office be examined, gentlemen will find that our troops were then so disposed as to fall down the river Mississippi, and act with effect, at any moment. It was well known to us that Spain did not act in that business from the mere impulse of her own interests or wishes. She was then, and is still, under the irresistible influence of a powerful neighbour, with whom we at that time had serious differences—she was urged and pushed forward by France. For Spain, until she became thus dependent upon France, has ranked high for her good faith, and, in my opinion, deservedly higher than any other court in Europe. Slow to promise, she has always fulfilled her engagements with honour, according to the spirit, without cavilling about the words of her treaties.

When we were aware of all these things, when there was no absolute refusal, but only delay and evasive excuses about the execution, not about the right, it would not have been wise to precipitate an absolute rupture between the two countries.

The proceedings with France are next adduced. These are fresh in the memory of every one, and need not be repeated. There was no blockade, no denial of egress to the ocean, no invasion, no territorial dismemberment, no attack upon the country which required the immediate use of force. True, they captured your ships, they heaped indignities upon you; but they also alleged that you had first broken the treaty of alliance. You negotiated: what else could you do? You had no navy. You could not go in quest of them, and they did not attempt to land on your shores. When their aggressions rose to such a height as to be tolerated no longer, and defensive war was resolved on, what was the conduct of the minority then? Did they come forward and offer their support like

the minority now? No, sir: they declared the administration was blameable; that the French had been provoked; that peace was still attainable by negotiation, and war at all events to be avoided. Look at the debates of that day, and you will discover that many leading men contended that our own government was altogether in the wrong, and France in the right. Such was the impression abroad, that Tallevrand insultingly boasted of a party in our own country, and threatened us with the fate of Venice; and when the sacred right of embassy was trampled upon, as stated by the honourable gentleman from New-York, still the cry at home was negotiate, negotiate. Surely there is very little if any resemblance between that case and this. However justifiable a war would have been then, we must have gone abroad to seek our enemy; now he has come to our doors, and stripped us of what is most precious and dear to us as an independent nation.

We are next told, under the third head of objections, that our national debt will be increased by war; that war will be the necessary consequence of the resolutions; that our object is war.

Sir, our object is not war, but the attainment of security for a right, without which our union, our political existence, cannot continue. In seeking this security, should war arise, it will be a less evil than insecure and delusive hopes of tranquillity. No doubt war will increase your public debt, but not more, nor so much as vain attempts to secure this right another way, and after failing you must have a war.

But your merchants will not obtain indemnities for spoiliations. Their chance is but precarious now, and would be altogether as great in the way we propose to take.

Seaports will be blockaded and the Mississippi shut. The first is not probable, and as to the last, all the western

people must be satisfied when they see their country maintaining and asserting their right. The very effort to maintain it will consume a great portion of the resources and afford an extensive market to the aggrieved people, by supplying your military force. The river may as well be shut up completely as be in its present condition.

An honourable gentleman (Mr. Wright) has said that we may have a place of deposit within our own territory and navigate the river from thence.

The gentleman certainly has not well considered this subject. The nearest point upon our territory is three hundred miles from the sea. The river crooked, the current rapid, the anchorage bad. A favourable wind in one direction of the river would be adverse at the next bend. Ships could never ascend in any reasonable time, nor could they gain any point on our own territory when they are forbidden to touch the shore even to fasten a cable or towline. Without the privilege of the shore, the navigation would be impracticable.

The honourable gentleman from New-York had advanced a most extraordinary position;—That if our adversaries have time to prepare, we also have time to prepare—Yet he resists the resolutions and proposes no effectual military preparations. While they are busy, we are to be idle—When they make the stroke, we are in our present defenceless state. Next year we shall be as weak and exposed as now, our commerce equally scattered over the ocean, our seaports as defenceless, our army and navy as weak, and they have then possession of the disputed spot with an armament to annoy us and maintain their possession.

The honourable gentleman from Kentucky, (Mr. Breckenridge,) disclaims all apprehension of disgust, or disaffection among his constituents, or any of the western people. They were not always in this mild, forbearing

temper upon the subject of the Mississippi. It must be in the recollection of that gentleman, that Mr. Genet sent emissaries into Kentucky, distributed commissions there for enlisting men, and raising an army to take New Orleans, and open the navigation of the Mississippi to the western people. A very gallant and able officer accepted the commission of general on this expedition, and would undoubtedly have executed it, had not the recal of the French minister, and the failure of the promised resources defeated the enterprise. What reason was there to suppose they would be more forbearing now? That officer was still alive, and if he were to erect his standard, the consequences could not be very doubtful.

The honourable gentleman from Georgia, (Gen. Jackson,) agrees with us in every thing except as to the *time of acting*. He wishes to make an experiment at negotiation, but admits the magnitude of the dispute, and that it involves the very existence of Georgia and the southern states.

If the late events had happened upon St. Mary's, or if the Savannah had been shut up by the Spaniards, there would have been little doubt of the course that gentleman would have pursued. The news of the aggression and of the aggressors' graves would have reached the seat of government by the same mail. He would not have waited to enquire by whose orders they came there, or whether they could be negotiated out of Georgia.

Although the honourable gentleman disagrees with us as to the time of acting, yet he has very honourably pledged himself for the ultimate result, should negotiation fail: and while it is impossible to agree with what he has said respecting the ordinary force of the country driving the new occupants from their fastnesses and forts in the marshes of Florida or New Orleans, yet, sir, there can be no doubt that the spirit which disdains to think of the

hazard of such an enterprise is of the utmost value to our country. For my own part, I have a pleasure in declaring my wish that the gentleman now lived on the Mississippi, and that he had authority from this government to act: I should have no doubt of the result, nor of the confidence and universal consent with which he would be supported. But he is certainly too much a soldier not to discern that previous possession by a powerful enemy will require the labours and blood of a disciplined army, and the delay and skill requisite for the attack of a fortified country.

We come now to consider the resolutions offered as a substitute. It is highly gratifying to find that gentlemen are at last inclined to act—to do something like defending the rights of our country. Is there any new shape given to this business by the proposed substitute? We propose fifty thousand militia—They substitute eighty thousand.—To do what? Will gentlemen tell us the difference?—It is said our's are absolutely imperative;—if so, alter them, and give an unqualified discretion.—We will agree to it. My own opinion is that they should be immediately acted upon. If the majority wish for a bare discretionary power, I assent to it. There is no difference, except that one set of resolutions puts greater power into the hands of the president than the other. Are gentlemen on the other side afraid to trust the president? Do they think he will abuse this power? Will it hurt the negotiation? Instead of hurting it, our minister ought to carry this act to Europe with him. He is not yet gone, and it may be sent with him—he would then have more means and more forcible arguments to urge in his negotiation.

This whole subject was known at the meeting of congress; yet no step taken till our resolutions were proposed. Now gentlemen are willing to do something!—They seem willing to give means to a certain extent. Why not amend our resolutions, when their own are but

a qualification of our's? We have but seven days to the end of this session. Why dispute about a substitute, when amendments may be made to meet gentlemen's wishes? They agree to go a certain length; then say so, and strike out the rest. Certainly we will go with you as far as you propose, for we have offered to go farther.

But gentlemen say they have full confidence in the negotiation. Be it so—I cannot doubt the assertion of the gentleman, although I draw a different conclusion from the same facts. But let me present this question in a new shape, not yet offered in this house. We are not deliberating about the right of deposit in New Orleans merely, nor about the island of New Orleans; we are told that we are to look for new and powerful neighbours in Louisiana. What right has Spain to give us these neighbours without consulting us? To change our present security into hazard and uncertainty? I do not believe that Spain has any right to do so. What are the limits of Louisiana? It extends three thousand miles upon your frontier. New Orleans is ceded with it. Then the province of Louisiana and New Orleans lie between the Floridas, and the other Spanish dominions on this continent. It is not difficult to pronounce who will command and own the Floridas. They must belong to the master of Louisiana and New Orleans! Then the owners possess the lock and key of the whole western country. There is no entrance or egress but by their leave. They have not only three thousand miles on your frontier in the interior country, but they have the command of your outlet to the ocean, and seven hundred miles of sea-coast embracing the finest harbours in North America. This makes them, in fact, masters of the western world. What will you give them for this enviable dominion? Not territory, for you have none to spare, and they want none. Not commercial privileges—they will not want them, for they will then have enough and to

spare. What equivalent have you? What can you offer to men who know the value of such a country? What would this senate take for the surrender of such an establishment were it our's? Let every senator ask himself the question and declare by what rule of estimation his answer would be dictated.

But I know it has been said, and will be said again, that the new French owners will confirm or permit our right of deposit and free navigation of the Mississippi.—They will open a free port and give us all we desire.

Yes, sir, this would be the unkindest cut of all. I fear much less the enmity of the present possessors, than such neighbours. We shall hold by their courtesy, not by the protection of our own government. They will permit, but you cannot enforce. They will give us all the advantages we now have, and more: But will it be for nothing? Will they ask no return? Have they no ulterior views? No—During this insidious interval they will be driving rivet after rivet into the iron yoke which is to gall us and our children. We must go to market through a line of batteries manned by veterans; and return home with our money through a fortified camp. This privilege will be held at their will, and may be withheld whenever their intendant forbids its further continuance.

No doubt my earnestness may have betrayed me into expressions which were not intended. Every honourable gentleman will therefore consider me as addressing his reason and judgment merely, without meaning to give cause of offence. But I cannot conclude without addressing myself particularly to those senators who represent the western states. I entreat them to remember that these resolutions are intended to vest a power which may or may not be used as events arise. If events should show in the recess that negotiation must fail, what is the president to do? He must call congress. This will consume

time, and the enemy gains immense advantages. Why not put a force at his disposal with which he can strike? With which he can have a pledge for your future well-being? When the Atlantic coast is willing, shall this security be lost by your votes? Are you sure that you will ever again find the same disposition? Can you recal the decisive moment that may happen in a month after our adjournment? Certainly the country may be in such a state that at the next session you will have no such offer as at the present moment. There may be a pressure which would forbid it. Heretofore you have distrusted the Atlantic states; now when they offer to pledge themselves, meet them and close with the proposal. If the resolutions are too strong, new model them. If the means are not adequate, propose other and more effectual measures. But as you value the best interests of the western country, and the union with the Atlantic coast, seize the present occasion of securing it for ever. For the present is only a question of how much power the executive shall have for the attainment of this great end, and no man desirous of the end ought to refuse the necessary means for attaining it. Your voice decides the direction this senate will take, and I devoutly wish it may be one we shall never repent.

MR. HANSON'S SPEECH,

ON THE LOAN BILL, DELIVERED IN THE HOUSE OF REPRESENTATIVES, (IN COMMITTEE OF THE WHOLE), FEB. 14, 1814.

THE executive government having required of congress, authority to borrow twenty-five millions of dollars to enable them to prosecute the war during the year 1814, the measure was strenuously supported by the friends of administration, and vehemently opposed by most of the members of the federal party. The principal reasons of their opposition in this instance, are urged in the following speech with all the animation, vigour, and boldness, which usually distinguish the eloquence of Mr. Hanson.

MR. CHAIRMAN,

WHEN I look before me and survey the vast and boundless prospect which the subject presents, my mind is almost overpowered. I scarcely know where to begin, how to proceed, when to conclude. Not that many topics of interest and magnitude do not remain untouched, through the considerate politeness of those who have preceded me—not that there is any dearth of reasons why the capacity should be withheld from those who evince a fixed determination to pursue a mad and ruinous career—nor that there are not still higher obligations than those imposed by a love of country, which command the patriot to break and diminish as he can the force of a blow aimed at her best interests, but it is setting oneself adrift upon the wide ocean, it is like hunting for arguments to prove an axiom, to assign reasons why this loan should not be granted—this war should

be no longer persisted in. Could one plausible reason be assigned for its continuance, sufficient arguments might then be called for to demonstrate the propriety and necessity of its termination. Could encouragement be derived from the past, keeping alive hope for the future, to stimulate us on the one hand; on the other, more than a countervailing depression and despondency would be produced, by a calm contemplation of the wonderful revolution in the affairs of the world since the fatal, ever to be lamented hour when administration first had recourse to its "attitude and armour." Every consideration which can be suggested by minds devoted to the good of the country, is arrayed against this bill. We have still much to lose, every thing to fear, nothing to hope, and as little to gain.

For a long series of time this administration has been pursuing a phantom—grasping at the shade of a shadow. At this hour they are no nearer their unattainable object than when they first started. Like the infatuated alchemist, they have persisted in their experiments until the very means of continuing them are well nigh exhausted, and without the most distant prospect of realizing their visionary expectations. It may truly be said, the sword was drawn against ourselves. *Failing* in the hopeless attempt to subdue Great Britain, we were disgraced, humbled, deprived of many valuable lives, the nation was loaded with an immense debt, the public safety jeopardized, or made to rest upon the humiliating and precarious reliance of an enemy's forbearance—*successful*, the sword was sheathed in the bosom of our own country. England conquered, where should we have concealed ourselves from the searching eye of the fell destroyer—where found shelter from the tyrant's fury. Victorious, we were conquered, defeated, ruined. Such is the nature

of the contest we are engaged in; a war without hope, carried on for objects unattainable.

Is any motive to be found for its continuance in its conduct, the events which have attended it, or what all must now join in believing will be its issue? With the same weak councils; with the same incompetent men to direct our armies; with a divided, disheartened people—contending against a formidable nation, united to a man against us by what they conceive to be the justice of their cause—flushed by the success which has every where attended their arms, left without a rival on the globe, what must be the consequence of adherence to feeble and desperate counsels? Released from her struggle on the continent, let England pour her veterans into Canada, can we conquer that province? Let her resistless marine, no longer restrained by motives of humanity, lay waste our seaboard; where are our means of defence? Already has army after army been driven out of Canada, captured, or slaughtered. Loan after loan has been negotiated and wasted, and without our rulers condescending to tell the people the causes of these disgraceful failures, but when called on by a solemn vote of this house to make known the causes, referring us to a mass of unmeaning documents, from which nothing is to be extracted but evidence of the incapacity and ignorance of all who have helped to swell the volume of trash—declaring it would be unsafe to trust the people's representatives with a knowledge of the actual state of our army—refusing to tell or unable to say what has been the cost of the war, or how the supplies already granted have been applied—keeping the people in the most agonizing suspense and painful ignorance of the state of the nation, and yet we are called on to unite in a vigorous prosecution of this war! My moral sense, sir, revolts at the invitation. Neither threats, denunciation, nor entreaty

can force or seduce me to plant a poniard in the breast of my country, already bleeding and languishing under so many wounds.

I am already admonished, sir, to prescribe limits to the range of debate I find myself gliding into. I proceed at once to examine the budget before the house. It is with some diffidence I enter upon an examination of the estimates submitted by the chairman of the committee of ways and means. That branch of the debate I was content to have confined to the two honourable gentlemen, (Mr. Pitkin and Mr. Sheffey,) who preceded me. I must however endeavour to supply some striking omissions in their luminous exposition of the public finances and resources. The great defect which runs through the exposition of the honourable chairman of the committee of finance is so important that I must claim the indulgence of the house, while I attempt to explain it. Though the house has been amused by fanciful, fallacious and exaggerated estimates to show the capacity of the people to *lend*, he has failed to elucidate the ability of the government to *borrow*. That ability depends upon the disposition of the people to invest money in the public stock. To produce that disposition, their interest must be consulted. It must be made their interest to lend, by furnishing sufficient government securities, providing indemnity against loss. If a permanent efficient fund is created, co-extensive and coeval with the public debt, and that fund pledged for the payment of the interest, the capitalist may then see his interest in becoming a public creditor. You then create the ability to borrow, by producing a corresponding disposition to lend, which in finance are convertible. But if, from a fear of losing popularity by resorting to an odious system of taxation, you fail to provide a permanent revenue adequate to the punctual payment of the interest, and

looking to the gradual extinction of the principal of the debt to be created, the public credit must suffer, and the monied men will find it to be their interest not to aid the loan. I have too much respect for the understanding of the house to enlarge upon this topic.

After a fair and deliberate examination, I pronounce the system of ways and means submitted to the house, *deceptive* and *disingenuous*. These are strong and harsh terms, but I speak in the language of the distinguished gentleman, who now presides in this house with so much ability, dignity and impartiality. I speak the language of the late committee of finance, and of this house, who adopted the memorable report of that committee, which denounced and reprobated in the strongest terms the very system now recommended. I speak the language of every financier and political economist whose opinions are respected in free and well regulated governments, when I say it is ruinous and destructive of public credit to enter upon a system of loans without providing the ways and means commensurate with the demands of government—without creating and pledging a fund securing to the public creditors the punctual payment of the interest and ultimate reimbursement of the principal of the public debt. It is a maxim in finance, a fundamental principle of public credit, never to borrow without providing the means of paying the interest, and finally extinguishing the principal. To act upon a different system, to rely upon loans to pay the interest of loans, is to adopt a most desperate system of fiscal gambling, sapping the foundation of public credit, and conducting to national bankruptcy. Well versed in finance, the predecessor of the present chairman of that committee, *could not be induced* to sanction, much less recommend a system of ways and means founded in a studied concealment of the public finances, and not built upon the sub-

stantial resources of the country. Disdaining to act upon a system of temporary expedients, to preserve the people's favour at the cost of the country's interest, he frankly communicated to the house the real state of the finances. He acknowledged the wants of the government. He introduced a system of revenue to meet the public exigencies, and preserve the public credit. Gentlemen cannot have so soon forgotten the letter addressed by the honourable *Langdon Cheves* to Mr. Gallatin. The reply of that minister must also be fresh in their recollection. So direct and explicit was Mr. Gallatin's answer in regard to taxes, that many at the time supposed, *I* was fully persuaded his object was to deter the congress from declaring war, by holding up to their view a frightful picture of internal taxation—the inevitable consequence of war. I must beg gentlemen to bear with me while I read an extract or two from the report of the committee of ways and means to which I allude.

The president, in his message of 1811, had suggested to congress the propriety of providing a revenue "sufficient, at least, to defray the ordinary expenses of government, and to pay the interest of the public debt, *including that on new loans*, which may be authorized." The committee in their report, thus respond to the president's suggestion:—"Any provision *falling short* of this requisition, would, in the opinion of committee, *betray an improvidence in the government, tending to impair its general character, to sap the foundations of its credit*, and to enfeeble its energies in the prosecution of the contest into which it may soon be drawn in defence of its unquestionable rights, and for the repulsion of long continued and most aggravated aggressions. Should the *ruinous system of relying altogether upon the aid of loans* for defraying not only the extraordinary expenditures of the present and succeeding years, but also a large por-

tion both of the ordinary expenses of government, and the interest on the public debt, including that on new loans, be *suffered* to prevail, and no additional revenues be reasonably provided, it will result—that the loans which it may be necessary to authorize during the year 1813, must amount to at least 17,560,000 dollars, and for 1814, to 18,220,000 dollars (this estimate was deemed liberal at the time, but it is 12,000,000 short of the actual demand) an operation, which, by throwing into the market so large an amount of stock, accompanied with no adequate provision for paying *even the interest* accruing on such as may be created; but relying altogether upon the decreasing ability to borrow for the purpose of paying such interest, must have a most unfavourable effect upon the general price of public stocks, and the consequent terms of the loans themselves: it may be added, that a system of that sort, would, it is believed, *be found to be altogether unprecedented in the financial history of any wise and regular government*, and must if yielded to, produce at no distant period, that *general state of public discredit*, which attended the national finances during the war of the revolution, and which nothing but the peculiar circumstances of the country, and *the want of a well organized and efficient government*, during the period of that revolution, could at all justify.”

Thus, we find, sir, in language just as it is strong, the system of expedients, now recommended, reprobated as ruinous, destructive of public credit, and evincive of the inefficiency and imbecility of government. But strong as are the terms in which the committee denounced the very system which is now to be adopted, rather than incur popular odium, by providing, in the only regular and practicable mode, the requisite ways and means, to leave no doubt of the fatal tendency of such a system, in their judgment, they proceed to condemn it in still

harsher language:—"To have *withheld from the public view, a fair exposition* of the probable state of the fiscal concerns of the government, under the very first pressure of active war, or to have *deferred* submitting to the house such a system as in the opinion of the committee was *indispensable* to place the revenues of the country upon a basis *commensurate with the public exigencies*, would, in their judgment, have at once evinced in the eyes of foreign nations, an *imbecility of action and design*, the effects of which must be too obvious to be mistaken, and as it regards our own country, would have indicated a *policy as feeble* and as *short-sighted*, as it must have been considered DECEPTIVE and DISINGENUOUS, as *unworthy the rulers of a free and enlightened nation*, as in its result it would have been found fatal to its interests, and paralyzing to all its efforts."

It is impossible to add to the force of the report which I have in part read. I shall only impair its strength and weaken its application, by dilating upon the sound maxims and correct opinions it contains. The committee expressed its full concurrence in the opinion of the secretary of the treasury, given in answer to a call upon him for an explicit avowal of his opinion. Mr. Gallatin's answer contains this paragraph:—"that what appears to be of *vital importance*, is, that the crisis should at once be *met* by the adoption of *efficient measures, which will with certainty provide means commensurate with the expense*, and by preserving unimpaired instead of *abusing* that *public credit* on which the public resources so eminently depend, will enable the United States to persevere in the contest, until an honourable peace shall have been obtained."

This report, leaving nothing to be added in condemnation of the very system so much deprecated at the commencement of the war, and now proposed to be act-

ed on, was adopted by this house. When, therefore, I pronounce the exposition and estimates of the honourable chairman of the committee of ways and means, to be deceptive, fallacious and disingenuous, I used the language of a committee of this house; a language not re-proved by the house itself, when it received the report of that committee; language that will be continued to be applied to the ruinous, deceptive and disingenuous system under consideration.

But, sir, I need not rely upon the message of the president, the letter of the secretary of the treasury, the report of the committee of ways and means, and the opinion the court party here expressed by the reception of that report, in applying suitable epithets to the exchequer budget. Out of his own mouth will I condemn the honourable chairman. At the last summer session, the gentleman, as chairman of the committee he still presides over, introduced a report which the house will indulge me with reading in part: "They (the committee) deem it unnecessary to say any thing as to the necessity of providing additional revenue at a time when the general rate of expenditure has been so much increased, by measures necessarily connected with a state of war,"—*"a provision for an additional revenue can no longer be delayed, without a violation of all those principles held sacred in every country, where the value and importance of national credit have been justly estimated."* And yet, sir, the honourable chairman who addressed this house and the nation in the manner mentioned, after a few short months, has overlooked and disregarded all those sacred principles, the violation of which he so much deplored.

A little attention will show the great *deficit* in the revenue to meet the interest of the public debt, the interest upon the new loan, and the expenditure for the peace establishment. By the treasury report it appears, that a

revenue of 12,050,000 dollars will be necessary to defray the expenses of the peace establishment, and satisfy the interest of the public debt. To meet this sum of twelve millions and upwards, the acting secretary of the treasury, in the annual report of that department on our table, estimates the receipts into the treasury:—

For customs and sales of public lands, at	\$ 6,600,000
Internal revenues and direct tax	3,500,000
Balance in the treasury	1,180,000

Total,	11,280,000
Making an acknowledged deficit of	770,000

For this deficiency no provision is made or proposed.

To this deficit, admitted by the head of the treasury department to exist in the sum mentioned, ought to be added

1,180,000

it being the balance in the treasury at the commencement of the present year, which will swell the deficit to

\$ 1,950,000

The balance in the treasury at the commencement of the current year can fairly be said to form no part of the revenue to pay the expenses of the peace establishment, and the interest of the public debt. It cannot be considered a part of the income of the year 1814, because it has heretofore been appropriated, and must be wanted to satisfy unsettled claims that have accrued the last year. So that a real deficit of nearly two millions exists, which no funds are provided by law to make good. But a fair deduction being made from the sum charged for the sales of public lands, and the revenue from the customs and sales of public lands will considerably increase the deficit stated.

The sum so arising is stated at	3) \$6,600,000
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Being reduced one third, and added to the deficit already made out	2,200,000
	<u>1,950,000</u>

it will make a total deficit, admitting the land tax to be renewed, of

\$ 4,150,000

To reduce, one third, the estimate of revenue to arise from commerce and sales of public lands, is proper and necessary, if our object is not to deceive the people and ourselves, but to arrive at truth. These sources of revenue can hardly be said to exist. During the war, which has caused the devastation and depopulation of the frontiers, it is not evident much can be expected to be derived from the sales of lands.* During an embargo, re-enforced by an extensive and rigorous blockade of the enemy, and of itself; so rigid that it is a subject of exultation among its authors, that vessels of every description are *chained to our wharves*, and the ports are hermetically sealed—during a rigid enforcement of a non-importation law, to be supported by another non-importation law, what revenue can be derived from commerce?

The necessity then exists to provide additional revenue to preserve the public credit, and to regard those maxims and principles set forth in such strong language, and so highly commended by the house on a former occasion.

Sir, it is an anomaly in political economy, it is a departure from the fundamental principles of public credit, to create a debt without providing the ways and means adequate to the payment of the interest. So say Gallatin himself, in his book upon finance, and the ever to be lamented Hamilton, in his works. This deceased statesman may be truly called the founder of the public credit of this nation. Called to the treasury, he found the finances of the country in the deplorable situation they are described to have been at the close of the revolution. But before the magic force of his genius, our fiscal embarrassments disappeared. He extracted order from chaos, light

* The failure of the sale of lands as a source of revenue is manifested by the applications entertained by the house, on the part of frontier settlers, for a considerable extension of credit in their payments for purchases already made.

from darkness. He made confidence to take place of distrust and general discontent. In the celebrated report of this great man, whose services to his country are second only to those of our great political father, we find the foundation of the argument I am feebly endeavouring to sustain. "*The secretary ardently wishes (says Mr. Hamilton) to see it incorporated as a fundamental maxim in the system of public credit, that the creation of debt should always be accompanied with the means of extinguishment. THIS HE REGARDS AS THE TRUE SECRET OF RENDERING PUBLIC CREDIT IMMORTAL.*" The comment upon this text is afforded by the financial system of Great Britain. Her chancellor of exchequer would as soon think of spunging the public debt, as to go into the market with his loan, without providing the ways and means commensurate with the demands of the government. *He would be hissed off the exchange.*

The public credit should be guarded with the vigilance and care due to female chastity. The federal administrations scrupulously regarded this great principle of finance. In 1798, when it was necessary, to meet the public exigencies, to borrow two millions of dollars in anticipation of the direct tax, the fund arising from it was solemnly pledged for the payment of the interest and the reimbursement of the principal. By pursuing the principles and advice of Hamilton, and the practice of all well regulated governments, was the credit of this country established. The means by which it is to be destroyed, the house is now called on to sanction.

The present men in power have not only endangered the public credit by a violation of "*all those principles held sacred by every country,*" but they have deliberately violated the public faith. The fact is demonstrable. The eight million sinking fund, pledged for the payment of the old public debt, has also been pledged for the pay-

ment of the eleven million loan, the sixteen million loan, the seven and a half million loan, and it is now to be again pledged for the twenty-five million loan. This same sinking fund is also pledged for the redemption of the treasury bills. These treasury bills, by law, are made receivable at the custom-house for the imposts. These bills, possessing no intrinsic value—a mere artificial value imparted to them by the fund pledged for their redemption, destroy the value of that very fund. The sinking fund is rendered valueless; and may ultimately, as far as it is derivable from commerce, consist merely of these bills, which are a legal tender for commercial duties. This position is so evident that it requires no illustration.

I must now be indulged with a few remarks upon the ability of the government to borrow, or the capacity and disposition of the people to lend. It has been admitted by one gentleman that the loan would be filled. I entertain no such opinion. I believe it will fail. Unless a most exorbitant interest is given, it must fail. Nor is it likely that any premium will ensure success.

The eastern states, being free from blockade, have become the depot of most of the foreign articles imported into the United States, for the supply of the whole American continent. These articles, owing to the *combined efforts* of the public enemy and our own government, cannot be paid for in the produce of the southern and middle states, and must be met by *specie*. If the coasting trade were not destroyed—if the trade of the several states with each other had to contend only against the public enemy, the debt thus accrued, in favour of the north, would have been discharged during the winter months, by the bulky articles of southern growth, easily transported by our coasting craft.

The president, in a manner not to be disregarded, recommended to congress to stop this traffic. The mandate

was obeyed; and specie alone must go to meet the demands of the merchants of New England. This causes such a pressure from the east, on the banks of the middle and southern states, as will deprive them of the means, if they have the disposition, to fill the loan. The accumulation of capital in the state of Massachusetts alone, enables that state, by pressing New York, to reach the extreme southern end of the chain of banks. It cannot be concealed, or denied, that a very general alarm is felt for the critical situation of the banks, produced by an accumulation of capital to the north in the manner mentioned. The consequence is, that the whole circulating medium of the country is in danger. Sir, gentlemen seem not to be aware of the difficulties with which they are beset. I do not wish to ruffle their serenity, by exciting apprehensions; but they should be prepared to encounter troubles which they have hitherto been strangers to. They should be prepared for an *explosion*, the noise of which may not reach their ears in time for their retreat. The very foundations of the government tremble beneath it. The ground on which ministers stand is hourly washing from under their feet. They have no excuse for not providing the ways and means called for by the public exigencies but the fear of offending the people, and yet the popularity of the war is the favourite theme of its authors. A crisis has arrived in the finances of the government, which, unless promptly and vigorously met by efficient measures, will bring on certain ruin. The credit of the government once destroyed, cannot be easily reinstated. It *must* be destroyed, if this system is pursued.

I will proceed now, Mr. Chairman, according to my original design, to examine the points in dispute between Great Britain and our government, and endeavour to

trace the events which have conducted us *directly* to this war. If I succeed in satisfying those, whose minds are not steeled against conviction, that instead of honestly and sincerely endeavouring to adjust our differences with Great Britain, administration has undeviatingly pursued the opposite course of provoking and exasperating England, I shall at least stand acquitted for the opposition I give this bill.

By referring to documents on your table, sir, it will appear that a negotiation was opened at London in 1804. It continued until 1806, when it was brought to a happy issue by the conclusion of a treaty of commerce and amity signed by Messrs. Monroe and Pinkney. It merits particular notice, that pending this negotiation, and when there was every reason to expect a beneficial result, in the same spirit of insincerity and unfriendliness which has since characterized every correspondence and negotiation with Great Britain, a law was passed by congress, through Mr. Jefferson's influence, calculated, and no doubt intended, to produce a rupture of the negotiation. I allude to the celebrated *non-importation law of 1805*. The avowed object of this act of the government was to coerce Great Britain to concede what we demanded—to obtain by compulsion what was only to be secured through friendly discussion and mutual concession. This compulsory measure could have but one effect, if indeed it be not certain, that such was its object—to excite a temper and irritation in the British ministry, which would thwart the efforts of our ministers to obtain a satisfactory and honourable treaty. However it may have been intended and ardently desired, that the measure should be considered as a rod held over the British ministry to intimidate and compel compliance with our demands, yet so ardent was their desire to preserve the relations of amity and commerce with the United States, that they

accepted and signed a treaty binding on their government, and left open for ratification or rejection by our government. This treaty, as I shall hereafter show, was pronounced by our ministers to be honourable for our government, and highly advantageous to its interests. It was nevertheless angrily and contumeliously rejected, without even being submitted to the consideration of the senate, the constitutional advisers of the executive.

I will briefly notice the three points of difference between the two countries, the adjustment of which was confided to Messrs. Monroe and Pinkney:

1st. Constructive, or, as they are denominated by the prevailing party, paper blockades.

2d. The carrying trade, or the rule of the war of '56.

3d. Impressment of *British seamen* from American merchant vessels.

I will not detain the house by a discussion of the old question of blockades. It would be sufficient for my purpose to show that by the 10th article of the treaty of December 1806, it was honourably and advantageously arranged. But whether it was so or not, the blockades were comprised in the more extensive system of the orders in council of 1807, and as those edicts have been repealed since the declaration of war, it will not be said we are now fighting on account of the blockades. They are now out of the question, as they form no part of the ground for *continuing* the war. I pass then, to the second point in dispute, to wit, the carrying trade.

I take it for granted, gentlemen know that the right was claimed by the United States to carry on a trade in time of war, which it is admitted we could not enjoy in time of peace—a trade between France, the mother country, and her colonies. Great Britain viewed this intercourse with a jealous eye, as indirectly aiding the great enemy against whom she was struggling for existence. She there-

fore required the neutral American vessel carrying the products of the colonies to the mother country to enter an American port, and unload her cargo, and to pay, upon re-exportation, a duty of one per cent. *into our own treasury*, and a duty of two per cent. to be paid upon the manufactures of the mother country, shipped to the colonies, under similar regulations. This rule was *inconvenient* to the merchant, but left the country in the full enjoyment of the great advantages of that lucrative trade, which enriched so many of our merchants, and poured so much wealth into the country. I shall not trespass upon the patience of the house by noticing the popular uproar raised by the "*shackles imposed upon a lawful commerce.*" It is sufficient to say, an honourable and advantageous arrangement, in the language of Colonel Monroe, upon this point of difference, also was embraced in the 11th article of the rejected treaty.

The third, and what is now pronounced the vital point in contest, although the war was declared on account of the repealed orders in council, is the claim to impress British subjects from American merchant vessels. The secretary of state, in a celebrated report, has taken occasion to avow that a repeal of the orders in council would not have prevented the declaration of war. Is this true? then I am at a loss to know why Mr. Foster, for the last few weeks preceding the declaration of war, was so closely pressed to stipulate their revocation, while the grievance of impressment, if alleged as a cause of war, as it never was before the war, was kept far in the back ground of the frightful picture, so often presented to the view of the people. But for once, I am willing to take the assertion of the secretary upon trust. Although it was pronounced a federal misrepresentation and falsehood at the time, to say a repeal of the orders would not satisfy the administration and prevent war, yet I am free to admit, I

do believe such a repeal would not, under the then auspices of France, have dissolved the bonds which connected us with that government. Bonaparte was urgent in his demands. He was to be put off no longer. We could not avail ourselves of the "*new chances*," when the Russian empire was overthrown, which the armies of the conqueror were ready to invade, unless we formally acceded to the continental confederacy. However, Mr. Chairman, I find myself imperceptibly sliding into a course of reasoning to which there are no limits this side the contemplated termination of the present session.

I come back, sir, to the question of *impressment* and the rejected treaty. But before I enter upon the examination of this question of *vital* importance, a few words in relation to the treatment and conduct of Col. Monroe upon his arrival in America, after his treaty was rejected.

The question naturally presents itself, what could have induced Col. Monroe, "*one of the pillars of Mr. Jefferson's happiness*," to sign a treaty sacrificing the honour of the nation, and compromising its best interests? What could have tempted him to negotiate a treaty so palpably bad as to demand an instant rejection? so flagrantly dishonourable as not to merit the ceremony of being laid before the senate? so obviously disgraceful as to call forth the censure and condemnation of his employer? Good easy man, he little thought, at that time, for Mr. Jefferson intrusts to few the secrets of his bosom, that a *treaty* was the last thing that was expected or desired. He did not know that a *treaty with England* would be deemed *equivalent to a war with France*, and that in no event was offence to be given to France. He supposed instructions would not have been sent to England to negotiate, unless in sincerity and good faith a favourable result was desired for that negotiation. He was soon undeceived upon his arrival. *He was sent into retirement upon his farm in Virginia, loaded with the*

reproaches of the republicans, for having basely "abandoned the rights and honour of the country"—for having done what was infinitely more unpardonable; for having endangered the integrity and existence of the democratic party. A treaty with England would deprive democracy of its food, of its natural aliment, without which it would pine and die. It would heal and hush animosity and clamor against that country. British antipathies, upon which the ruling party subsists, would be removed. This was his inexpressible offence; to atone for which, he was driven from the presence of the court, into banishment, in the ancient dominion. He retired with those feelings which wounded honour excites—for he yet retained his honour. In his retirement he attracted the sympathy and compassion of the least zealous of all parties. The plan was conceived, and upon suggestion gained daily proselytes, to put him in nomination at the next election, in opposition to the present incumbent of the palace. The moment was critical and interesting. Mr. Jefferson, who has so long governed the country in secret, and who only retired after he had gathered a storm whose frightful aspect overpowered his nervous sensibilities, could not view unconcerned the dangerous schism which threatened the democratic party. The great magician ascended the pinnacle of his favourite mount, and waved his wand over Richmond. It had an electrical effect. The parties were immediately brought to the famous conference at *Monticello*. All was instantly arranged. The disgraced minister was reconciled and again taken into favour. His aberrations were pardoned. He returned to Richmond, and there received the requisite *white-washing*, in the modern political mode. He was quickly exalted to the gubernatorial chair of the great state, as a preliminary step to a regular induction to the office of state, which he now fills. Having sat out his appointed period upon the patent stool of political repentance,

he then passed from his probationary state of governor to his allotted station in the direct line of Virginia succession, and is ere long to mount the throne. Yes, sir, *James the second* is ripe and ready to undergo the ceremonies of coronation, whenever *James the first* shall see fit to abdicate in his favour. That the house may judge how far the present conduct and principles of the heir apparent are reconcileable with his former professions, I beg to be indulged while I read a few pertinent paragraphs from the book which he found it necessary to write in his vindication, while he was yet under the royal displeasure.

“I have on the contrary always believed, and still do believe, that the ground on which that interest (impressment) was placed by the paper of the British commissioners of Nov. 8, 1806, and the explanations which accompanied it, was both *honourable and advantageous to the United States*; that it contained *a concession in their favour, on the part of Great Britain, on the great principle in contestation never before made by a formal and obligatory act of the government, which was highly favourable to our interest,*” &c.

“We were therefore decidedly of opinion, that the paper of the British commissioners placed the interest of *impressment on ground which it was both safe and honourable for the United States to admit; that in short it gave this government the command of the subject for every necessary and useful purpose.* Attached to the treaty, it was the basis or condition, on which the treaty rested. Strong in its character in their favour on the great question of right, and admitting a favourable construction on others, it placed us on more *elevated ground* in those respects than we held before.”

“War, therefore, seemed to be the inevitable consequence of such a state of things, and I was far from considering it an alternative, which ought to be preferred to the ar-

rangement which was offered to us. *When I took into view the prosperous and happy condition of the United States, compared with that of other nations; that as a neutral power they were almost the exclusive carriers of the productions of the whole world; and that in commerce they flourished beyond example, notwithstanding the losses they occasionally suffered. I was strong in the opinion that those blessings ought not to be hazarded in such a question.* Many other considerations tended to confirm me in that sentiment. *I knew that the United States were not prepared for the war; that their coast was unfortified, and their cities in a great measure defenceless; that their militia, in many of the states, was neither armed nor trained, and that their whole revenue was derived from commerce. I could not presume that there was just cause to doubt which of the alternatives ought to be preferred."*

These extracts, sir, speak for themselves, and need no commentary. How far, since he has been restored to favour, the colonel has disregarded these opinions and proved worthy of his employers, may be gathered from an important occurrence during the spring session. I claim the undivided attention of the house, while I explain the matter to which I allude.

It will be recollected, that during the spring session, the president nominated the noted Jonathan Russell minister plenipotentiary to the court of Sweden. Mr. Russell's character did not stand very fair before the public, on account of an alleged omission, on his part, to deny the assertion of the Duke of Bassano, that the French repealing decree, of April, 1811, had been regularly, and in due time, communicated to this government, or its accredited agent at the French court. Before acting upon the nomination, the senate conceived it would be proper to ascertain, officially, the grounds of the suspicion against Mr. Russell's fidelity and truth. A committee for that

purpose was appointed by the senate, with instructions to wait on the secretary of state, and enquire into the fact of the alleged culpable omission to vindicate the honour and veracity of his government at the French court. Having performed the duties assigned to them, that committee *reported in form* to the senate, that they had called on the secretary of state, and made the enquiry they were instructed to make, and that the secretary had given for answer, that no *official letter* was in the department of state containing the contradiction or communication required; but he informed them there was a *private letter* in his possession, which *he said* contained such a contradiction. Here ended the *report* in substance to the senate; but I have it from the mouth of more than one of that committee, it is no secret, sir, that the said private letter was read to them by Col. Monroe, but *it contained no such contradiction.*

Well, sir, about this very time, that the senate was engaged in the investigation, the attention of this house was called to the same subject on motion of my distinguished friend from New Hampshire, (*Mr. Webster*). *After much difficulty*, the house adopted the resolution calling for the information. When behold! an *official letter* was produced, *in due form suitably dated*, and regularly authenticated—Yes, sir, the very identical letter which Col. Monroe had but a few days before solemnly told the senate was not in the department of state—*not in existence!* I claim permission then to place the secretary on the horns of the dilemma. Either the letter was in existence, and in the department of state when called for by the senate, or it was not. If the affirmative assertion be true, *then the secretary was guilty of a wilful untruth*—if the negative, *then it must have been fabricated for the occasion*; and deposited in the department of state afterwards, to answer the purposes of the parties implicated. There is no evad-

ing this result—it is palpable—inevitable. We are brought to it by the testimony of the secretary of state himself, than whom there can be no better witness *against himself*—This one act of legerdemain diplomacy fixed him in the confidence of his employers. The sin of negotiating a treaty with England was expiated—was more than counterbalanced by a successful extrication of the ministry from extreme difficulty.—He won the approbation and applause of his party. The sentiments of Col. Monroe, in relation to a treaty with England, when left to think for himself, and at liberty to act independently, may be found in his letter of vindication. What his sentiments and *principles* now are, the world must judge from his actions. That judgment impartially formed will not vary much from the estimate I have made of his character.

After this digression, into which I have been led by Colonel Monroe's exculpatory letter, I will return to the question of impressment, which is the only remaining cause of quarrel with Great Britain, and for which the war is continued. England claims the right to impress her seamen from our merchant vessels. To take *American citizens*, she has never for a moment set up the extravagant pretension. The similarity of language and manners between the two people gives rise to many vexatious abuses of the exercise of the right of impressment, and the only possible mode of accommodating the opposite claims of the two governments is by negotiation and mutual concession. Struggling as England has been for existence, depending upon her marine for defence and protection, she could not permit neutral merchant vessels to be converted into an *asylum* for deserters from her service, without endangering her navy. Her seamen are her right arm. You sever it from her body, or lash it tight to her side, whenever she is forced to permit her seamen to be tempted into neutral service, by the higher wages and better treatment they there receive. The facility with which

her subjects are naturalized in this country, the barefaced perjury which provides them with protections, without trouble or expense, reduced England to the necessity of exercising, as an act of preventive justice, what she claimed as a belligerent right, or submitting to the growing and alarming evil of losing her best mariners. As it could not be expected of her passively to connive at such an abuse of her rights and attack upon her national safety, nor expected of this country to sit quietly under the abuse of the practice of impressment, the difference could only be settled by treaty. It was so settled, as I have before shown, by Col. Monroe, and upon terms precisely such as it is not denied administration is now perfectly willing to accept. Nor can it be doubted they would have come to the same terms before, but from a fear of France, and a *habit* of submission to that power. A wise and provident ministry would have been content with an arrangement relinquishing the *practice* of impressment, without stipulating a formal abandonment of the *principle*.

I will say a few words upon the question of the right of a nation to the service of her subjects during war, and to seize them on a common jurisdiction. There is nothing novel in the claim of a belligerent to call home her subjects to assist in defending their country. She may take them by force to aid in the common struggle for self-preservation. *A belligerent has a right to search neutral vessels.* It has never been denied by our government, *though it has been disputed on this floor.* In his famous letter of instructions to Mr. Monroe, Mr. Madison directs him to stipulate, in the treaty he was negotiating, a renunciation of the claim to take from neutral vessels any person “*not in the military service of an enemy; an exception (says he) which we admit to come within the law of nations, on the subject of contraband of war.*” The right of search is then admitted. For what may the belli-

gerent search? For contraband of war, which is lawful prize to the belligerent; for persons in the military service of the enemy, whom she may make prisoners, *upon the principle of preventing them from doing her future harm*. If, under the acknowledged right of search, Great Britain could search American vessels, and take therefrom whatever was legal prize to the seizing belligerent, and could also *make captive enemies' subjects*, how much stronger is her claim to *her own*, to take what is neither enemy nor neutral, but what always belonged to her—*her own subjects, whose services are required for the common defence*. It being admitted that she may make prisoner of an enemy, to prevent his doing the belligerent future harm, why may she not take her own subjects for the same purpose of strengthening herself, and weakening the enemy, by aiding in repelling his attacks? It stands to reason—it partakes of the justice of the principle of search and seizure, that a neutral cannot protect by forcible adversary possession the *subject of a belligerent*, when it cannot protect *the property or military subjects of an enemy*. This is the dispute between us. We claim the right to protect British subjects out of the jurisdiction of our laws, by giving an extra-territorial operation to municipal regulations. In his letter of instructions to Mr. Monroe, before referred to, Mr. Madison says, “if the law of allegiance, which is a *municipal law*,” &c. and yet we claim to protect foreigners out of our jurisdiction, who owe but a local temporary allegiance to the United States, against the prior and permanent claim of their native country. It will be shown hereafter, that the arm of protection is to be extended beyond our territorial limits as well for the protection of foreigners of that description, as those who have undergone the legal process of naturalization. That we do claim the right of protecting British subjects, *deserters* or not, is to be found in

every declaration and act of administration. The same letter before referred to, page 11, contains this passage:—" *With this exception (contraband of war) we consider a neutral flag on the high seas, AS A SAFEGUARD TO THOSE SAILING UNDER IT.*" Thus, an asylum is to be afforded by American merchant vessels to British deserters. It is for a recognition of this haughty and extravagant pretension, which no British minister dare recognise, that we are at war. A pretension which they have reiterated, they *could not* recognise, though they have as often manifested a sincere wish to come to an arrangement, which would be mutually satisfactory to both nations. Our government has never met their wishes expressed on this subject by a corresponding disposition or overture. An abandonment of the *right* is what they have never ceased to demand. And when instructions to that effect have been uniformly given to ministers, can any one believe a treaty has been honestly and sincerely sought by our rulers. To present the question fairly, by explaining the views and feelings of the British government, upon the question of impressment, tedious as may be the process, I must read a few extracts from documents before the house.

Messrs. Monroe and Pinkney held a conference with Lords Auckland and Holland, on the 22d of August, 1806. These commissioners, always deemed friendly to this country, declared " that they felt the strongest *repugnance* to a *formal renunciation* of their claim to take from our vessels on the *high seas*, such seamen as should appear to be *their own subjects*; and they pressed upon us with much zeal, *a substitute for such abandonment, &c.*" " They enforced this (say our ministers in their despatch) by observing, that they supposed our object to be to prevent the impressment of *American seamen*, and not to *withdraw British seamen* from the service of their country, in times of *great national peril*, in order to

employ them ourselves; *that their proposal would effect this object*; that if they should consent to make our commercial navy an *asylum* for all British seamen, the effect of such a concession upon her maritime strength, on which Great Britain depended, might be **FATAL**."

Although willing to accept a *substitute*, which would completely provide for the interest and secure the honour of the United States, it appears that Great Britain never would *yield the principle*.

In a despatch from our ministers, on the 11th Sept. 1806, they say the British ministers asserted the right of seizing *her own subjects*, adding that "the relinquishment of it at this time would go far to *overthrow their naval power*, on which the *safety of the state essentially depended*."

In 1806, the British commissioners referred the question to the law officers of the crown, who reported in favour of the *right* of taking their own subjects, and the commissioners themselves then added, "that the relinquishment of it was a measure which the government *could not adopt* without taking upon itself *a responsibility, which no ministry could be willing to meet, however pressing the emergency might be*."

Having thus given their final answer, the British ministers, still anxious to arrange the dispute upon impressment, submitted to our ministers the subjoined counter-project to that which Col. Monroe was directed to propose. "Whereas, when one nation is at war, and the other at peace, it is *not lawful for the belligerent* to impress or carry off from the neutral vessel seafaring persons who are the *natives* of the neutral country, or others, who are not the subjects of the belligerent; and whereas, from similarity of language and appearance, it may be difficult to distinguish the subjects of the two states, the high contracting parties agree for the greater security of

the neutral subjects, they will respectively enact such laws as shall subject to heavy penalties, the commanders of belligerent ships, who shall carry off the subjects of the neutral on any pretence whatever." What, sir, could be more fair? or more fully answer the pretended claim of administration? The proposal was, nevertheless, rejected. The British ministers, still anxious to place the question upon the best possible footing for this country, addressed a note to our ministers, from which I beg leave to read a short extract:—They state "that instructions had been given and should be repeated and enforced, for the observance of the greatest caution in the impressing *British seamen*, and that *the strictest care shall be taken to preserve the citizens of the United States from any molestation or injury*, and that *immediate and prompt redress shall be afforded upon any representation of injury sustained by them.*"

In noticing this letter to our government, Messrs. Monroe and Pinkney say, "every thing is expressed in it that *could be desired*, except the *relinquishment of the principle.*" But Mr. Madison, in his celebrated letter of instructions, of May 20, 1807, says to Messrs. Monroe and Pinkney, "you will observe, that the proposition is so framed, as not to comprehend among *British seamen* those who have been *made* citizens of the United States, and *who must necessarily be so regarded* within their jurisdiction, *and under our flag.*"

We are at war then for a principle which Great Britain has declared she never would yield, although she was willing to *compromise*—for a principle, which Mr. Monroe declares was "honourably and advantageously arranged" by the rejected treaty of 1806. This is the object of the war now avowed by its authors. I may hereafter show it was engaged in for objects altogether different.

Mr. Chairman, upon this question of impressment, allegiance, protection and *retaliation*, which has been connected with it, gentlemen here may fret, rail, and argue until doomsday. They may set up new fangled doctrines, unknown to public law, and deny old and established principles, but as far as depends upon the opinions of the ablest jurists and the practice of the oldest regular governments, the point in controversy is long ago settled. It is immutably determined. It is inherent in the very nature of society and government. If it were otherwise, every political society would contain the seeds of its own dissolution and destruction, instead of the great inherent principle of perpetuity and power. Sir, we have no right to the service of the subjects of a foreign prince. We *can*, if we choose and have the power, protect them against the superior claim of their native country; we *may* declare a war for such an object, but we derive no such *right* from social regulations or the public law of nations.

It is a fundamental maxim of the common law of England, which, I believe, we have no power to repeal, or just pretension to render nugatory in its operation, "that natural allegiance is perpetual, and cannot be affected by time, *place*, or circumstances, nor can it be changed by *swearing allegiance* to another sovereign—the subject may to be sure by such means *entangle himself*, but he cannot unloosen the hands which connect him with his native country."—[See *Blackstone's Commentaries*.]

Availing themselves of the indulgence of pursuing their happiness in whatever climes their fortunes may lead them, if they form engagements with another government inconsistent with their prior and permanent obligations to their native country, it is *an act done in their own wrong*. They enter into a contract from its

nature, void *ab initio*, because it requires two parties, both able, to make a valid contract. In the case mentioned, one of the parties to the contract of naturalization was disabled from contracting. If the foreigner, owing original and permanent allegiance to his native country, from which he has no power to absolve himself, except by her consent, *express* or *implied*, engages to perform opposite and irreconcilable duties, he alone is to blame for the difficulties in which he may find himself involved. —This I conceive a full answer to every thing alleged of the hardship of naturalized citizens being *forced* to perform conflicting duties. Is it said naturalized citizens may be *forced* to bear arms against their native country, and therefore are entitled to protection from their adopted country, as native citizens are within, and without our territorial jurisdiction? They were not *forced* to abjure allegiance to their government. The fault is their own, if they have “*entangled themselves*” by an act done in their own wrong.

In the case of retaliation presented to the nation, the president goes further than some gentlemen of the ministerial side seem prepared to follow him. He not only claims to protect foreigners naturalized by our laws, but this protection is to be extended to emigrants who owe merely a local temporary allegiance to this country. According to his delusive, unsound doctrine, those are to be protected who have “*incorporated themselves into our political society*,” not according to our laws, but according to “*the modes recognised by Great Britain*.” Now, sir, I am prepared to go a step further than has been deemed necessary from the actual case presented to our consideration. I say, an Englishman, naturalized or not by our laws, if found in arms against his native country, is a *traitor* by the laws of his native country. I do not confine the position to British subjects naturalized here, and

made captive within the dominions of their sovereign, where the arm of protection cannot be extended, but if the armies of the enemy crossed the lines and invaded us in turn, and made prisoner a Briton in arms against Britain, he is as much a traitor as if taken in the heart of the British empire. If by the laws of England her subjects cannot throw off their allegiance, and are taken in arms, no matter where, they must answer to the offended laws of their native country for the parricidal act. I can see no assignable difference in the cases, according to the laws of England, and who is born in that political society, is bound by its primary laws and regulations. They are not to be annulled, or altered, for the convenience of an individual, or the few, to the imminent danger or destruction of the many. Our naturalization laws can have no more binding effect upon other nations, than any other *municipal regulation*. By claiming to give them an extended operation to other countries, we interfere in their internal government. We set up the lofty and high sounding pretension of legislating for the whole world—*of making our acts grafts upon the public law of nations—of incorporating our municipal acts into the great code of nations*. If we mean and are able to contend against a world in arms, this new and towering pretension may be persisted in, as similar innovations have been by invincible conquerors, who know no laws human or divine, that assign bounds to their ambition. Upon no principle, neither according to the previous admissions and practice of our own government, nor the long established principles of other nations, can we maintain such a claim. It is hardly necessary to detain the house by reciting the circumstances of *Clark's* case, who was taken as a spy and discharged by Mr. Madison. The case of *Williams*, decided by Judge Ellsworth, in Connecticut, also shows by our laws, as well as those of Great Britain, that *allegiance*

is perpetual. The celebrated case of M'Donald, shows what the law and practice is in England, and *France*, who never thought for a moment of resorting to retaliation, for the trial and condemnation of an adopted citizen who had lived in France from his infancy, held a commission in her service, and was taken in arms against England, and tried as a traitor. Such men are *traitors*, in the legal true sense of the word, and ought to be treated as such. The good of society and the safety of governments requires it. If, to protect them, we resort to a bloody, ferocious, exterminating system of retaliation, we shed the innocent blood of our own countrymen. We cause the blow to be struck, though we do not immediately aim or direct it. I say then, without reserve, if the president proceed in the ruthless bloody business he has *commenced*, he is answerable, here and *hereafter*, for all the American lives wantonly sacrificed. Posterity will pronounce him guilty, and heap maledictions upon his name. The unnatural deed will blacken the page of our history.—When the party contests of the day are forgotten; when the passions engendered by political strife have subsided; when reason shall resume her throne, and the present generation is swept into the silent tomb, those who live after us will pronounce a dreadful judgment upon the chief actors in this tragedy of blood and murder. As chief magistrate of this republic, I owe your president, sir, much respect, still I have no oil of adulation to pour upon his head. As the *chief* of a *party*, I turn from him with instinctive dread and *loathing*; still, so prosper all my efforts here, I wish him no other ill, than that he may live long enough to see his errors—to become sensible of the miseries and afflictions he has brought upon this abused people—to repent and to reform!

The question of impressment was *advantageously* and

honourably arranged, in the opinion of our ministers. Not a doubt is now entertained that administration would hail with joy a treaty similar to that rejected.

The second reason assigned by Mr. Jefferson for rejecting the treaty, was, that the English ministers reserved the right of retaliating the Berlin decree, if it was not resisted by this government. I say, without any such reservation, she would have been perfectly justifiable in adopting a system of retaliation, after a reasonable time allowed this government to resist that edict. But she was so anxious to leave this government without a pretext for discontent, that she would not resort to the laws of self defence without due notice to us collaterally involved by this commercial warfare. Instead of receiving this avowal of the necessity to which England might be reduced, of inflicting upon France the evils of her own injustice, in the spirit in which it was made, it was another reason with Mr. Jefferson for rejecting the treaty. And here permit me to say, that no man of an independent discriminating mind, and of sound judgment, can doubt the justice of the British retaliation of the Berlin decree, as far as any neutral was concerned, who had acquiesced in that decree; otherwise the contest with France would have been most unequal. Allies in the disguise of neutrals could shield France, while the breast of Britain was bared to the sword of her enemy. But it was not for Mr. Jefferson to become a party by implication, as he feared it would be deemed in France, to any plan of resisting the great system of commercial annihilation commenced at Berlin. No, Bonaparte's attitude at that period was too imposing to allow of such rash counsels as implied an attachment to commerce, and a determination to oppose a barrier to French encroachments. "The great and generous Napoleon" had just broken into fragments the triple coalition. Prussia struck down, and her power

broken to pieces; Russia driven to her frontier, and converted to an ally from an enemy; the "supereminent Napoleon," seated on the throne of the Great Frederick, was dictating law to the commercial world. The Berlin decree was the commencement of the very system to which we are one of the very few parties left. It was intended to incorporate into the new commercial code the very principles which have been contended for on this floor; nothing therefore could have been more remote from Mr. Jefferson's wishes or intentions, than any stipulation which looked like resistance to the Berlin decree. Under such circumstances, and at such a time was it, that the treaty was rejected. At a time when the prophets and wise men here talked familiarly of a national bankruptcy in England, or of her speedy overthrow by Bonaparte, if a civil war was not produced by our restrictive energies, which were driving the manufacturers to madness and desperation. From this time we were gradually drawn into the great continental confederacy, the principles of which were *sanctified* by the decree of Berlin. Now came the vaunted *treaty of Tilsit*. It was the corner stone of the immense fabric built upon the Berlin decree. At Tilsit was digested and methodized the grand scheme of commercial annihilation commenced at the Prussian capital, not many months previous. By enticing or forcing all the states of the continent into this league, their ports were to be shut against British commerce. How far the continental system succeeded among the states of Europe the world well knows. How far, thenceforward, Mr. Jefferson evinced his steady purpose of uniting in the war upon commerce, is to be collected from the acts of administration. Tedious as I may be, yet it is necessary, to arrive at the results I propose, to take a rapid view of some of the acts of co-operation with France, which stain our statute book. The **EMBARGO** stands first and pre-

eminent in this *black catalogue*. It is notorious, it was familiarly talked of in the Paris Coffee-Houses. It was a topic of *tete a tete* in the coteries of the Imperial metropolis. Our minister in France gave warning of the measure. Merchants on the continent wrote to their correspondents here to prepare for an embargo upon all our ports. At length despatches arrived from Gen. Armstrong, and as quick as the thunder succeeds the flash that announces it, *our ports were sealed*. An embargo unlimited as to duration, and universal in extent, *sat* like *Incubus* upon the land, blasting its best fruits more than all the congregated fluids of the heavens poured down at once upon our crops. How are we to account for this foreknowledge in France of measures to be adopted here? How for the decree promulgated by Bonaparte avowedly to enforce the embargo? There is but one explanation. But it is not the least mortifying circumstance, that while the rays of the great political sun of Europe illumined the track of merchants and speculators on the continent, our poor outcast merchants and deluded people were left to grope in the dark, without a faint glimmering of light to guide them. It is enough to add, "Napoleon the Great" applauded the embargo, *as a generous renunciation of commerce, rather than submit to the shackles imposed on it*.

The next important event, which forms one of the links in the chain which connects us with France, is the grand congress at Erfurth, in Nov. 1808. There the system of commercial annihilation, stipulated at *Tilsit*, was to be more completely organized and rendered universal. I do not say, sir, we were avowedly, and in due form represented at that congress. But one fact is established beyond contradiction. A Mr. *Short*, whose name had not been heard before by one man in ten thousand, was secretly despatched, *via* France, in good season to arrive at that congress. Although I have always understood he travel-

led quite as rapidly as Mr. Barlow, who lost his life by dancing attendance on Bonaparte, I cannot say that he arrived in time to take his seat in the general congress. One thing is certain, if he went upon any other errand it never has been stated, while the appointment of the man, and his mission, was, at the time, as unknown to the people as the "secrets of the prison house." It is equally certain, when he was afterwards nominated to the senate, he was *unanimously* rejected. His appointment was contrary to law, because there was no vacancy to fill during the recess of the senate. But Mr. Jefferson had done what he wanted, and was not to be put off from his purpose. Disappointed in his man, he was not to be frustrated in his ultimate design. Mr. Adams was therefore nominated minister to St. Petersburg.—This son of the father had said, when the embargo was *recommended, upon the high responsibility* of the president, "*the Senate should not doubt or hesitate.*" For so noble a sentiment he must be rewarded, upon the principle of buying off impatient and hungry office seekers. And I do fear, we have as yet had only a *fore-taste* of the efficacy of this mode of *purchasing* supporters for the administration. On Mr. Adams's subject, I have only to add, there is a region in Russia that would be a fit clime for a man of such pliable patriotism and convenient principles to spend the remainder of his days.

The embargo came *exactly* in aid of the invasion of Spain. As the legions of the conqueror were descending into her fertile plains, like a mountain torrent, we did our utmost to make them the easy prey of their invader. We could do no more than was done, to say nothing of the attempt to steal from her, provinces, while she was struggling for self-preservation. Yet gentlemen are restless, and become angry whenever the fact of the co-operation of administration with France is alluded to. Sir, I will

consent to abandon my whole course of political thinking, and to be ranged under the court colours, on the treasury bench, if it can be shown in what respect the policy of administration has been at variance with the policy of France, for *six successive years*. It is a melancholy, degrading truth, that we have followed her track as faithfully, as fleetly, and as *clamorously* too, as the keen-scented, well-trained hound pursues the fox. If occasional deviations have occurred, it was only because the trail was lost through the intricacy of the path—but the leader of the pack soon got upon the right scent again. His imperial majesty has no other ground of complaint against us, except that we have sometimes been thrown out in the chase.

I mean not to be understood, sir, as disputing the *right* of the majority to pass what laws they please, keeping within the pale of the constitution—to form what foreign leagues or alliances they see fit. But while I admit that it is the “prerogative of the majority to act, I maintain the privilege of the minority to *protest*.” I shall ever claim and exercise the right of showing by fair and manly argument, the fact of the co-operation of ministers with France, and the baleful effect of such co-operation. When sir, your journals show it; when your annals teem with evidence of a systematic co-operation with France, in all her views, why are gentlemen startled by a reference to the fact? Why do their cheeks mantle at the charge of hating England, when they do burn with rage against her, and admiring France, when they once expressed that admiration as ardently as ever lover wooed his paramour, or Cleopatra sighed for the embraces of her Roman Antony.

You relieved yourselves from the embargo, sir, by the artful arrangement of April, 1809, made in *bad faith* and never intended here to be carried into effect, even if ratifi-

ed by England. Its ratification in London was securely guarded against by the language in which it was made. But to make the matter sure, as if a double bond of fate were taken, the spirit and letter of the convention were formally contravened by a legislative act, admitting equally the vessels of war of France and England into our waters. Under that act, too, the secretary of the treasury issued a circular opening a trade with France through Holland, her *dependency*, so pronounced subsequently by Bonaparte himself, when he chose to chastise us for that arrangement. This was done in the same spirit and with the same view, that Mr. Madison interwove his invectives against the British monarch, into Mr. Smith's letter, before it was known whether the arrangement would be avowed or disavowed in England.

The embargo being "hissed off the stage," in the course of time, as the able gentleman from Virginia (Mr. Sheffey) told you, the nation was amused with "*Macon's little bill, No. 1, and little bill, No. 2.*" It escaped the sagacity of the honourable gentleman, that *this little bill, No. 2*, innocent and harmless as it appeared, contained the seeds of this war. It was intended to lay, and did lay the foundation of the famous, I should say *infamous* juggle of the celebrated Cadore letter. To enable the President to negotiate with effect, it conferred upon him *legislative powers*—the power to annul and re-enact a law of congress. Even in the griping reign of Henry VIII. of England, when a complying servile parliament clothed that monarch with legislative powers, by giving to his proclamations the binding force of law, the people resisted the encroachment. The cry was, *Magna Charta* is invaded! and the voice of the people prevailed. The king submitted—not so here. Henry VIII. was a griping tyrant, but not quite so stubborn as our master. Mr. Madison clung to his prerogative as legislature as well as executive, and

he succeeded in legislating the country into a war. From the date of the Cadore letter, the government travelled on step by step, until the country was completely enmeshed in the toils of the usurper. We passed from non-intercourse to embargo, and to non-importation upon non-importation, fully persuaded that Great Britain had but a few short months to survive, and hoping for the glory of sharing the spoils with Napoleon. Dr. Franklin somewhere remarks, that "we assemble parliaments and councils to have the benefit of their collected wisdom, but at the same time we have the inconvenience of their collected passions, prejudices and self-interest. By the aid of these, artful men overpower their judgment and dupe their understandings. And, if we may judge from their edicts, arrets and acts, all the world over *for regulating commerce*, an *assembly of great men*, is the *greatest fool on earth*."

Mr. Chairman, as early as 1794, Mr. Madison began to impregnate the minds of those who have since supported him, with all the absurd notions which now prevail of the efficacy of *our restrictive energies*. Ever since he has been in power, he has continued to test his favourite theory by lacerating the nation with a self torturing suicidal system, which even to this day, against all experience, is persisted in. It will be persisted in with an obstinacy proportioned to the greater importance of preserving Mr. Madison's reputation for consistency, to relieving the people and preserving the union. Sir, I am tired, tired, *sick* of this perpetual, never-ending, still-beginning recurrence to your restrictive energies, or in more appropriate language, your anti-commercial fooleries. What effect have they had upon England? no more than children's pop-guns would have upon the walls of Quebec. Gentlemen now know, that a non-importation law against England is a mere *brutum fulmen*. How has she regarded

your tremendous starving, non-consuming system, that was to drive her manufacturers to rebellion? You have not so much as checked or deterred her one moment in the gigantic noble effort to liberate the enslaved nations of Europe. Her means of subsidizing the nations, united in resisting usurpation and tyranny, have not been in the smallest degree diminished. The work of emancipation has progressed with a steady and a quickened pace. The glorious work of deliverance has now arrived at its proud point of consummation, in spite of all the laborious artifices here, to insure success to tyranny and usurpation. Feeble, feeble indeed have been our measures against England and the Allies—formidable and afflicting to ourselves! But even now, sir, now that *our cabinet has been dragged by the collar to Gottenburg*, to sue for peace, if they have the good luck to get a treaty, which happens not to have SUBMISSION written in CAPITALS on the title page, I have not a doubt, it will be ascribed to the magical efficacy of your restrictive energies. So deep in love with this system, is its authors, that even now, when the deliverance of the continent has opened so many markets to the British manufacturer, that the supply is too small for the demand, yet no doubt, the system will be continued. Yes, *enlarged*, by another non-importation law! And for what? If for no other reason, to hold out the appearance that we have not been acting in concert with France heretofore, because we continue the system even after it is broken up on the European continent. This sort of management is very well understood at the palace. It is to be hoped, however, that gentlemen will state the *reasons and objects at large*, for passing the non-importation law, which has come down from the senate. That law too like the bounty bill may be carried to Gottenburg in the pockets of our ministers, by way of *coercing* England! And when the treaty comes, “I told you so!” will

exclaim gentlemen; "see what our *restrictive energies* have done at last!" No doubt, sir, all the credit will be given to embargo and non-importation, and not to the defeat of Bonaparte: so have gentlemen succeeded in puffing this political catholicon, which, like all other nostrums, will never stand in need of a certifier to vouch for its infallibility. But, sir, this nation will not be for ever the dupe of quackery and imposture. The signs of the times warrant a belief that the people in their hearts loathe these restrictive nostrums. The time is not distant when the grand inventor will not only cheerfully dispose of his patent right, but will strive hard to cast the credit and glory of his invention upon his adversaries.

Sir, when we look back upon the past, and forward to the future, I can see no claim that administration have upon a single honest man in the country to support them *one hour longer* in their visionary schemes and impracticable projects. I call upon gentlemen to lay their hands upon their hearts and say, whether they have performed one promise, redeemed one pledge, from their accession to this day. What good have they done for the country? what mischief have they not attempted or executed? they came into power with their mouths full of promises, and are likely to go out covered with the curses of an abused and betrayed people. To acknowledge error, and retract, is of the highest order of virtue, but of an altitude above the reach of *common minds*. We have then nothing to hope from acknowledgment and retraction. What, I say, were the leading professed principles of these men when they came into power? Love of peace, aversion to conquest, riveted attachment to liberty, regard for economy, and respect for the rights of other nations. Yes, sir, we were to have a *millenium* under democratic rule. Federal sins and abominations were to be atoned for by the pious and goodly works of democracy. This was all very fine,

while the word of promise to the ear was kept, but for the performance let the condition of the country testify. To describe it would sicken the patriot heart.

Sir, as to your restrictive warfare, once more let me ask, what has it done for you? You pledged all your political character, you staked all your pretensions as statesmen, to bring the proud monarch of the detested isle to your feet if the restrictive system were fairly tried. Did you not try it to your heart's content? for one long and unbroken period of eighteen months? and were you not glad to get rid of it by a diplomatic manœuvre? From time to time, you tried a variety of other expedients, all eventuating in like failure and disgrace. Laughed at and ridiculed at home, made a bye word in Europe, you were *jeered* and *goaded* into war. Yes, you went to war, say some, because the minority laughed at you, and, it was said, you could not be "kicked into war." The same men now say, they will make peace if the minority will let them, that is, if they wont laugh at them for giving up all they have been contending for. You have tried war just as long as you have tried embargo, and instead of *humbling* England, as you promised, you have not been able even so much as to conquer her pitiful little province next door to you. She barely allowed you to cross her threshold, when you were driven back, covered, not with laurels and glory, but with shame and dishonour—the common fate of boasters. But how much blood and treasure this conquest of Canada has cost, the people will never be permitted to know. It would not be *republican-like* to tell them. They might *abuse* the confidence so reposed in them, in a manner not precisely according with the views, and pleasing to the nice sensibilities of their rulers. One thing is certain—you commenced with your tremendous wonder-working starving system six years ago, you tried it in all its various and

multifarious forms—and with what effect? well nigh to destroy yourselves. You then declared war. This was to strike England senseless to the ground. Take it altogether, sir, most curiously, indeed, have our affairs been conducted. You have pursued the true circular policy. Like a certain crawling animal, called the caterpillar, or like the dog trying to catch his own tail, you have gone round and round in a circle, without arriving an inch nearer your point of destination. You began in 1807 with an embargo, and here you are, in 1814, with an embargo again. Sir, it is time, high time, for rulers thus proved to be imbecile and incompetent—totally unfit to manage the affairs of this people, either in peace or in war, to abandon the elevated stations which they cannot fill, and to make way for abler and better men. Upon this subject I beg not to be mistaken. Let it not be supposed I would have the incumbents of power to give way in our favour. If I know any thing of the views and feelings of the honourable and virtuous men who compose the party to which I belong, they want not power now; nor would they accept it under existing circumstances, unless *to save the country*. No, sir, such is the wide waste and desolation visible every where, that no man or set of men, who would undertake to repair these ravages, could preserve the people's favour longer than a single term. Your government is made a perfect wreck—it is scarcely worth bringing into port. Such deep root has corruption taken in this country, that he who attempts to restore the constitution to its original purity and force will engage in a profitless pursuit—his labour compensating his pains. I repeat, *no*, sir. Select from your own party, if to be found, a man of honour, talents, integrity and independent spirit. Such a man who would be the chief magistrate of this united empire, and not the chief of a faction, would unite the confidence of all honest men.

Call him by what political name you please, he would receive the support of all good citizens. Such a man, so supported, might be able to re-construct the dilapidated edifice of government; to rebuild those institutions of freedom that have been so long decaying and tumbling in ruins about us. We will take power, sir, when the people fly to us for salvation—when they seek shelter from misery and oppression in the wisdom and virtue of federal counsels, they will not find us shrinking in the hour of peril when they fly from democracy as from pestilence, famine and nakedness, we will give them food and raiment, and healing medicines. Thus much, sir, in answer to the charge of opposing government from a desire to obtain power.

Next, in the long list of measures of co-operation with France, comes the declaration of war—couched almost in the precise terms that Bonaparte had declared war for us, not very long before—"war *exists* between the United States and Great Britain," &c. This measure was resolved on, just as Bonaparte was invading Russia. Having for a series of years aided France as far as in our power lay, in the plan of stabbing England to the heart, through her commerce, we now drew the sword to despatch her in fair combat.

Bonaparte's first plan of conquering England was by invasion. Our rulers had not the glory of participating in this grand enterprise, which, when the bubble burst, turned out a mere blind for his designs against the continent. After much blustering at Bologne, and prodigal waste of treasure, the flotilla was abandoned, and the tyrant entered upon the execution of his vast scheme of continental conquest. This finesse of invasion was a servile imitation of an admirable stroke of policy by Julius Cæsar, who, meditating a blow nearer home, collected a large flotilla at *Sipontum*, *Tarentum* and *Brundisium*, as.

a feint against Spain. So also was his celebrated interview with the emperor Alexander, on the water, at the treaty of Tilsit, in imitation of the meeting between *Octavian*, *Young Pompey* and *Mark Antony*, in their ships drawn up in view of the Roman people, who lined the beach to witness this imposing spectacle.

The plan of invasion abandoned as chimerical, the grand object of overthrowing England was to be effected by a fair contest for the mastery of the seas. This second farce was to commence as soon as one hundred ships of the line were ready for the exhibition. Terrible to England and titilating to the republican sensibilities of the Napoleonites, who joined in the cry that "France had ships and we had seamen," as this mighty navy project was, it also was abandoned.

A new system was now started, to "conquer the freedom of the seas" by the destruction of commerce. In this *play*, Mr. Jefferson had his part assigned him in the cast of characters. The plot was simple, and to appearance happy and easy in its execution. The *reasoning* was catching and irresistible. The navy of Great Britain constitutes her power. It is the stay and prop of her empire; the pillar of her greatness; the sheet anchor of her existence; the great, and *then* the only barrier to universal despotism. The commerce of England maintains that navy. Annihilate commerce, shut the ports of the world against her, and the work is completed, the business is done. The props thus undermined and the pillars torn away, the whole fabric of British greatness falls, and is crushed to pieces. France succeeds to the dominion of the seas, is resistless on the land, and the enslavement of the human family is sealed. I have already shown, sir, how this government systematically and faithfully co-operated with France, in her continental system.

Even now, Mr. Chairman, *but yesterday*, it was an-

nounced here—the emperor, cooped up in Paris like Louis the Fourteenth, in an address to his senate of slaves, proclaims that the only states that adhere to him are America, Denmark and Naples. The two last, he boasts, remain faithful to their alliance, while the United States continue a *successful war against England!* It is too true, sir, these vassal states excepted, we are the only people now ranged on the side of France. We were the last to embark in the great imperial ark, which has so long rode triumphant on the waves of despotism. It was not the ark of safety, for it has *founded*. Every soul on board is saved, or endeavouring to escape but us—Poor Americans!—people awake! abandon the wreck, or we sink and perish in it. A moment's delay may be fatal. While we deliberate, all may be lost. *Dum deliberamus quando incipiendum, incipere jam serum fit.* See! there is but one shattered plank remaining between our country and the abyss below.

I had much to say, upon the subject of *opposition*, and the causes of the decline and fall of the ancient republics, a topic introduced on a former occasion, by a gentleman from South Carolina (Mr. Calhoun). This would naturally lead to a comparison of the character of our opposition, and the present situation of the country which demands it, and the character of the opposition by the men now in power, and the condition of the country when we were in the majority. From such a discussion *we* can have no motive to shrink. It is to be courted, and I hope will be pressed by others, so well able to exhibit the *contrast* in striking colours to the nation. I have not the strength left to trace the rise and progress of parties, and to compare their principles, professions, and actions. The history of *Genet*, *Adet* and *Fauchet*—the attempt to force Washington from his neutrality—the clamour for war in 1794—the furious, desperate opposition to

Jay's treaty—Mr. Madison's resolutions, intended to produce war—colonel Monroe's submission to the French directory, his recal and disgrace—above all, the whiskey insurrection, which constitute some of the items in the account of the character of the opposition made to us while in power. I gladly turn from the disgusting picture.

Tedious and desultory as my remarks have been, Mr. Chairman; worn out as your patience must be, and as is my strength, I must nevertheless claim further indulgence, while I offer a few remarks upon the subject of an *armistice*. As such an event is now ardently desired, certainly by the people, if it is not *expected* by government, it is proper to show how administration has met this question on former occasions. So shall we arrive at the probable result of our negotiation for such an object. I mean to show, how administration has made and met advances for an armistice, as it may have an important bearing on events which will sooner or later engage our attention.

Eight days after the declaration of war, 26th June, instructions were sent to Mr. Russell, from which I ask the indulgence of the house, while I read an extract:—"If the orders in council are repealed, and no illegal blockades substituted to them, and orders are given to *discontinue* the impressment of *seamen* (*mark! British or not, naturalized or not*) from our vessels, and to restore those already impressed, there is no reason why hostilities should not immediately cease—*securing* these objects, you are authorized to stipulate an armistice."

Such were the conditions upon which a cessation of hostilities would be consented to by Mr. Madison. An actual renunciation of the practice of impressment must *precede even an armistice*. Great Britain, as a condition pre-requisite even to a suspension of hostilities, must

relinquish the exercise of a practice which she claims as an essential right. It may be thought impossible that our government betrayed so much presumption and folly as this demand presupposes, but let us see how Mr. Russell understood and construed his instruction. In his letter of 24th August, 1812, to Lord Castlereagh, he says, "he is authorized to stipulate with his Britannic majesty's government an armistice, *on condition* that the orders in council be repealed, &c. and that orders are immediately given to *discontinue* the impressment of *persons* (not American citizens, but *persons*, deserters or others) from American vessels." In other words, sir, as *a condition precedent to a suspension of arms*, Great Britain is, in the outset of the contest, to give up every thing for which she has been contending, as *absolutely* as though she were beaten in battle, and conquered. A proposition for a truce would neither be made nor listened to by our haughty, proud cabinet, unless England yielded, surrendered unconditionally, and *passed under the yoke*. The power of England was considered still in the wane—our imperial ally was yet in the plenitude of his greatness. I need not enlarge upon this topic. Whatever relates to it is now understood, and begins to be felt by the whole body of people.

We may inquire impatiently—well! how did Lord Castlereagh answer this demand of Mr. Russell, made in the language of his instructions? As was expected, desired, and no doubt foreknown by our rulers, if after all their experience they have yet learnt any thing of the English character. I will read his lordship's reply—"I cannot refrain on one single point from expressing my surprise, that as a condition *preliminary even to a suspension of hostilities*, the United States have thought fit to demand that the British government should desist from its ancient and accustomed practice of im-

pressing *British seamen* from merchant ships, simply on the assurance that a law shall hereafter be passed," &c. Thus, sir, Mr. Madison was once more disappointed in the attempt to extort from the fears of England what she could not otherwise be induced to concede, as endangering her existence. *Will the same language be held at Gottenburg?* It depends upon another question—how fares it with the great belligerents? will there be a general peace? have dissensions sprung up among the allies? is the "Great Napoleon" stripped of his power and renown? are we to be no longer dazzled by the lustre of his foreign conquests?

But governor Prevost offered us an armistice. It was instantly rejected by Mr. Madison. In a letter from Mr. Monroe to Mr. Russell, August 21st, 1812, he says—"As a principal object of the war is to obtain redress against the British practice of impressment, an agreement to suspend hostilities even before the British government is heard from on that subject, might *be considered a relinquishment of that claim.*" And yet Great Britain was to relinquish all her claims, abandon all she contended for to obtain a *truce*. This kind of reasoning at once puts an end to all armistices. An armistice implies submission by neither party, nor the abandonment of any point.

Another correspondence upon the subject of an armistice took place with admiral Warren, showing on the part of Great Britain a continued desire for peace, on terms honourable to both nations, and compatible with the safety of her people. As further proof of the pretensions of Mr. Madison, I ask leave to read a short extract from a letter of col. Monroe to admiral Warren—He says, "that a suspension of impressment during the armistice seems to be a necessary consequence. It cannot be presumed, while the parties are negotiating, that the United States

would admit the right, or *acquiesce* in the practice of the opposite party." To remove all doubts of the pretensions and demands of our government which they required to be gratified before a suspension of arms would be agreed to, I will read one more extract. It is from the closing paragraph of Mr. Monroe's letter to admiral Warren:

"If there is no objection to accommodation relating to impressment other than the suspension of *the British claim* to impressment during the armistice, there can be none to proceeding WITHOUT AN ARMISTICE to the discussion and arrangement of that subject—The great question *being* satisfactorily adjusted, *the way will be open to an armistice.*" First settle what we are, or we say we are, fighting for: give up your claim of impressment; acknowledge yourself in the wrong; concede what we demand, and then we will agree to a *truce*. In other words, there shall be no suspension of arms until the objects of the war on our part are fully obtained and completed. What were we to relinquish in return for such a concession of essential and vital importance to England? Comparatively nothing—in *fact* nothing upon which England placed the value of a farthing. Will the same tone be preserved at Gottenburg? How fares it with the continent? Is Philip sick?

To agree now to an armistice, which is not preceded by, or does not include an arrangement of the question of impressment, upon terms consistent with former pretensions, will be *submission*, not on the part of the country, but by Mr. Madison—It will be hauling down the colours of administration.

Every moment, sir, that this war has been continued since the armistice agreed on between governor Prevost and general Dearborn, it has been under a new character, whatever may be said of its justice when declared. The policy, necessity, and justice of the war was a settled

he succeeded in legislating the country into a war. From the date of the Cadore letter, the government travelled on step by step, until the country was completely enmeshed in the toils of the usurper. We passed from non-intercourse to embargo, and to non-importation upon non-importation, fully persuaded that Great Britain had but a few short months to survive, and hoping for the glory of sharing the spoils with Napoleon. Dr. Franklin somewhere remarks, that "we assemble parliaments and councils to have the benefit of their collected wisdom, but at the same time we have the inconvenience of their collected passions, prejudices and self-interest. By the aid of these, artful men overpower their judgment and dupe their understandings. And, if we may judge from their edicts, arrets and acts, all the world over *for regulating commerce, an assembly of great men, is the greatest fool on earth.*"

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